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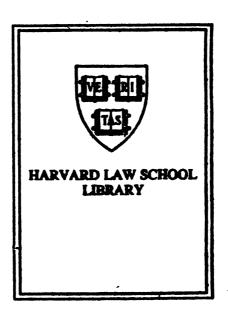
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VOL. 53

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA

APRIL-JUNE, 1893

CHARLES C. WILLSON REPORTER

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FREDERICK P. BROWN

SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE PECPLE OF SAID STATE

Rec. Aug. 10, 1894.

JUDGES

OF TILE

SUPREME COURT OF MINNESOTA

DURING THE TIME OF THESE REPORTS.

Hon. JAMES GILFILLAN, CHIEF JUSTICE. Hon. WILLIAM MITCHELL. Hon. DANIEL A. DICKINSON. Hon. CHARLES E. VANDERBURGH. Hon. LOREN W. COLLINS.

CHARLES P. HOLCOMB, Esq., Clerk.

ATTORNEY GENERAL,
Hon. HENRY W. CHILDS.

(iii)

By 1878 G. S., ch. 27, § 2, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on 1878 G. S., ch. 63, § 4, the head note in each case is prepared by the Judge writing the opinion.

The statement of the case is made by the reporter, from the return to this court. The epitome of the arguments is condensed from the briefs of counsel. For the correctness of these, the reporter alone is responsible.

Dated Rochester, Minn., May 31, 1894.

CHAS. C. WILLSON.

(iv)

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

HAZEN M. PARKER vs. EMANUEL S. St. MARTIN et al.

Argued by appellant, submitted on brief by respondents, Dec. 21, 1892. Decided April 7, 1893.

Redemption by Judgment Creditor from Foreclosure Sale.

A subsequent lienholder cannot be deprived of his right to collect his debt by redemption, to the extent of the value of the property over the amount paid to redeem, by the interposition of the liens of fraudulent and simulated securities.

Measure of Damages of Such Creditor if Prevented by Fraud from Bedeeming.

But, if thereby prevented from redeeming, his damages would not exceed the amount of his debt.

When Validity of Intervening Liens will not be Investigated.

In a case where a lien creditor redeems from a prior lienholder and redemptioner, and the property is ample security for all the liens, the court will not, at the instance of such subsequent lienholder, undertake to inquire into the validity of, or the amount due on, prior liens in order to enhance the value of the property in the hands of the last redemptioner.

Appeal by plaintiff, Hazen M. Parker, from an order of the District Court of Hennepin County, Canty, J., made May 19, 1892, sustaining a demurrer to his complaint.

The complaint stated these facts; In 1881, Peter M. Peterson v.53m.—1

owned the south half of the northeast quarter and lots two (2) and three (3) in section thirty (30,) and lot four (4) in section twentyeight (28,) in township twenty-seven (27) range twenty-four (24) in In that year Peterson and wife mortgaged all Hennepin county. this land to the Northwestern Mutual Life Insurance Company. 1884, Peterson died intestate, leaving his widow, Hilda, and four minor children, Albert, Anna, Esther, and John, his heirs at law. His estate was administered in the Probate Court of Hennepin County, and on May 1, 1886, the lands were distributed to his widow and children, but the mortgage debt was not proved or paid. October 11, 1886, the defendant Emanuel S. St. Martin was by said Probate Court appointed general guardian of the persons and estate of the children, and he continued to act as such until April 1, 1890. The mortgage to the Insurance Company was then foreclosed in the District Court, and the land sold to the company in one parcel for the amount due on the mortgage and costs, and on January 26, 1889, the sale was confirmed. St. Martin obtained license on December 30, 1889, to sell the interest of the minors in the lands at private On January 25, 1890, he sold to defendant Alfred E. Baillif, for \$650, the interest of the minors in the southwest quarter of the northeast quarter and in lot three (3) in section thirty (30,) and their interest in lot four (4) in section twenty-eight (28,) and the sale was confirmed by the Probate Court, and a deed was made and re-On the same day Baillif mortgaged this property to the ·corded. defendant Walter S. McLeod for \$1,500, due in one year, with interest, and McLeod filed notice of his intention to redeem from the foreclosure sale to the Insurance Company. Six judgments had meantime been recovered and docketed against the widow, and were a lien on her interest in the land. The judgment creditors all filed notices of intention to redeem. January 26, 1890, fell on Sunday. On the next day plaintiff recovered and docketed a judgment against the widow for \$52.37 and filed notice of his intention to redeem. Neither the owners of the land nor either of the first six judgment creditors redeemed, but McLeod made affidavit of the amount due on his mortgage, and redeemed by paying the amount for which the land was sold at the foreclosure sale and interest and sheriff's fees, and received a certificate of redemption. The plaintiff in due time on March 7, 1890, redeemed from McLeod, by paying the amount he had paid and \$1,513.66 more, and all fees, and received a certificate of redemption and became the owner thereunder of all the lands mortgaged to the Insurance Company.

Two years thereafter, plaintiff discovered that St. Martin, Baillif and McLeod on January 25, 1890, formed a conspiracy to defraud whoever should redeem the land, and to obtain \$1,500 from such redemptioner. That the guardian's sale to Baillif, and the mortgage to McLeod, were without consideration, and were made in furtherance of the conspiracy and to compel any subsequent lienholder to pay the amount of that mortgage in addition to the debt to the Insurance Company, in order to redeem. Plaintiff further discovered that it was agreed among them that, in case the \$1,500 should be thus obtained, St. Martin was to have \$650 of the money, and the balance was to be equally divided between Baillif and McLeod; and that the money was in fact subsequently so divided among them. Plaintiff had, at the time, no notice or knowledge of these facts, and was thereby induced to, and did, pay \$1,513,66 more than was due on all just and legal liens on the property, and was defrauded and damaged that amount, and he demanded judgment against the three conspirators for the \$1,513.66, with interest and costs.

The defendants demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer. The complaint nowhere stated the value of the land, or the amount of the mortgage to the Insurance Company. Another litigation regarding this property is reported in Peterson v. Webber, 46 Minn. 372. The facts there stated are at variance in some particulars with the allegations of the complaint now under examination.

Hazen M. Parker, pro se.

It is alleged and admitted that there was no debt to support the mortgage for \$1,500. Therefore McLeod was not a creditor; and not being a creditor, he could have no lien, and nothing to assign to a subsequent redemptioner. In order to constitute a lien, there must

be the relation of debtor and creditor between the party holding the lien and the party against whom it is held. Furthermore, the indebtedness required to support a lien is an actual, valid and bona fide indebtedness. Karnes v. Lloyd, 52 Ill. 113; Martin v. Judd, 60 Ill. 78; Arnold v. Gifford, 62 Ill. 249.

The statute, 1878 G. S. ch. 81, § 16, gives each bona fide lien creditor who has properly filed a notice of intention to redeem, the absolute right to redeem by paying the amount of the valid claims against the property redeemed, or some part thereof. The law does not contemplate, and much less does it countenance spurious claims. value of the property cannot cut any figure whatever. Pamperin v. Scanlan, 28 Minn. 345. It is alleged in the complaint that McLeod complied with all the provisions of the statute in making his redemp-This allegation is admitted by the demurrer. He produced to the officer the evidence of his lien, properly certified, and presented his affidavit of the amount then actually due thereon. The mortgage being regular on its face, and given by a party who had a right to make a mortgage, plaintiff had a right, not knowing anything to the contrary, to rely on its being a valid lien, and could not have been justified in refusing to pay it. He was compelled to pay it, in order to redeem and protect his own rights.

I have been unable to find any case where fraud has been attempted in the way adopted by these defendants. Fraudulent schemes are as multiform as human ingenuity can devise. sential feature, is the attempt to deceive, by causing others to believe that things are different from what they really are, and to cause them to act on that mistaken belief to their injury. The form of the deception is wholly immaterial. A fraudulent act and an injury occasioned by that act, are the essential features. Benzein v. Lenoir, 1 Dev. Eq. 225; Clifford v. Brooke, 13 Vesey, 131; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Phelps v. Wait, 30 N. Y. 78; Eaton, C. & B. Co. v. Avery, 83 N. Y. 31; Wilson v. Green, 25 Vt. 450; Paddock v. Strobridge, 29 Vt. 470; Ballou v. Lucas, 59 Iowa, 22; Crown v. Carriger, 66 Ala. 590; Wilson v. Sykes, 84 N. C. 213; Denham v. Kirkpatrick, 64 Ga. 71; Bank of Woodland v. Hiatt, 58 Cal. 234.

Has plaintiff any redress in the premises? He was compelled by the act of defendants to pay \$1,513.66 more for the land redeemed, than the aggregate of all the valid claims against it. In other words, the defendants, without any legal right, have stepped in and placed a bogus mortgage on the property, and have sworn that it was a valid mortgage, and that there was a specific sum actually due thereon, and have thus taken from plaintiff this sum of money. In doing this they have committed a wrong, with intent to injure, and have injured plaintiff. That being the case, they must be accountable to plaintiff for that injury.

James W. Lawrence, for respondents.

Plaintiff finds fault that defendants so managed the minors' property that he was unable to take the same from them and their successors, upon a judgment of \$52.37 against the widow, who happened to be a part owner, without paying anything for the minors' interests. He comes to this court with a claim inequitable and unjust upon its face.

Defendant St. Martin is sued as an individual, not as guardian. In selling the property he did so as guardian, under the direction of the Probate Court, which had exclusive jurisdiction. For the proceeds of the sale he cannot be called to account by plaintiff. Any surplus he received he also received for his wards. This action therefore cannot be sustained against St. Martin.

Baillif purchased from the guardian under the same proceedings and acquired a good title in fee. He therefore had a right to do with his property as he pleased, either deed or mortgage it or redeem the property as owner. Even if this were not so, yet if he did mortgage it without consideration, but the mortgagee afterwards paid him a portion of the consideration, he can retain and apply it. He therefore is not a proper defendant in this action, or responsible to plaintiff.

Defendant McLeod, being the successor as mortgagee to Baillif's recorded title, is entitled to his discharge, for the reasons given above. Plaintiff had no lien when defendant McLeod acquired his mortgage, and he had no right to interfere with him.

Defendants had the right to so manage the property of the minors as to prevent the plaintiff or any other person from taking it away from them without paying its full value. Plaintiff has no right to claim the minors' property had in it any debt paying power to him, he having a debt and lien only against the property of the widow.

Vanderburgh, J. In 1884 one Peterson died seised of the lands described in the complaint, then subject to a mortgage thereon, previously executed by him to the Northwestern Mutual Life Insurance Company. He left him surviving, his wife, Hilda, and four minor children, to whom the land was assigned by the probate court, in the proportion of one third to the widow, and the remaining two thirds to the children, undivided.

The mortgage was afterwards foreclosed, and the year for redemption expired January 27, 1890. Prior to the foreclosure the defendant St. Martin was appointed guardian of the estate of the minor children, and on or about December 30, 1889, he obtained a license of the probate court to sell their interest in the land at private sale. It is further alleged in the complaint, and admitted by the demurrer, that on the 25th day of January, 1890, the three defendants conspired together to cause a mortgage to be made of the two-thirds interest of the minor children, alleged to be without consideration, but nominally for the sum of \$1,500 and interest, which should be an apparent incumbrance thereon for that sum; the object being to practice a fraud upon subsequent lienholders who should redeem from such foreclosure sale, and thereby secure to themselves the amount of the consideration named in the mortgage in case such subsequent lienholders, or any of them, should redeem. To this end it was agreed between the defendants that St. Martin, acting as guardian, should sell the interest of the minor children to defendant Baillif under the probate license, and that the latter should execute the mortgage as above described, with note for same amount, to McLeod, without any consideration running from the latter. It was also agreed between them that Baillif should make no redemption, but Mc-Leod should redeem by virtue of his mortgage, as a creditor having a lien, and that, in case any subsequent creditor having a lien should redeem from him, then, from the redemption money paid him, to the amount of the mortgage, should be paid Baillif's purchase money for the land conveyed to him by the guardian's deed, (\$650,) and the balance should be divided between the defendants. The guardian's report of sale was made and approved January 25, 1890, and the same day the deed was recorded, and also the mortgage to McLeod, who also, at the same time, filed notice of his intention to redeem; he being the fifth in order of redemption creditors. None of the owners of the land having redeemed, the creditors made redemption in their order. Subsequently to the execution of the mortgage, and on the 27th day of January, 1890, the plaintiff recovered a judgment against Hilda Peterson which on that day became a lien on her one-third interest in the land, and on the same day filed notice of intention to redeem. There were other redemption creditors subsequent to the mortgage, but having liens prior to that of plaintiff, so that plaintiff was the last redemption creditor, and the eighth in order. amount of plaintiff's judgment was \$52.37; but neither the value of the land nor the amount of the lien claims, save as above stated, appears. The plaintiff made final redemption, and in the amount paid was included the sum of \$1,513.60, being the amount of the mortgage above referred to, and the interest thereon, as called for by the terms of the same; and the defendants, it is alleged, recovered the same of the redemption creditors entitled to redeem next in order to the mortgage, and applied and divided the proceeds as they had previously agreed to do, as above stated. The plaintiff had no notice of the fraudulent character of the mortgage, and was deceived thereby, and made redemption in reliance upon the record thereof as a valid lien. The plaintiff therefore claims that as the result of the alleged conspiracy, and the fraudulent conduct of the defendants, he was obliged to pay the amount of the mortgage in addition to what he was lawfully required to do in order to effect redemption; and he claims that he is entitled to recover the same of the defendants, on the ground that the mortgage was absolutely without consideration, and that McLeod was not in fact a creditor having a lien, entitled to redeem, but was a fraudulent redemptioner.

On the first impression, the case stated in the complaint seems very plausible, but upon a careful examination it will appear, we think, that it fails to make a case warranting a recovery by the plaintiff. It omits any reference to some matters essential to be considered in order to a clear understanding of the case, but which cannot well be overlooked in the discussion. In the absence of any allegation as to the value of the property, or the amount of the original mortgage and other liens, we may infer that it was sufficient to pay them all, including plaintiff's judgment, notwithstanding McLeod's intervening incumbrance.

Again, nothing is stated in respect to the understanding between the parties in the event that there should be no redemption from McLeod, and the title should finally rest in him, but it is proper to consider the legal relations and rights of the parties in that contingency.

The first and most essential condition of the contract was that McLeod should make the redemption and secure the title. The stipulation as to the division of the profits depended upon a subsequent redemption from him. The guardian's sale, mortgage, and redemption by McLeod were, according to the agreement, to be parts of one entire transaction. It was a device or plan to secure a redemption. It was doubtless also anticipated that other lienholders would redeem from McLeod, but if they had not done so the legal title would have passed to him; for there is no question that his redemption was effectual, as between the parties. In that case McLeod would either be adjudged to hold the title as trustee, subject to an accounting for his advances, or he would be obliged to pay over the consideration of his mortgage.

The fact that no consideration money was paid to Baillif at the time did not necessarily make the mortgage without consideration, as between McLeod and the real beneficiaries, especially if, as we think may be inferred, the consideration for the guardian's sale was raised by, and was to come from, the McLeod mortgage, as a part of the transaction; and, since the redemptions have been made under and from it, it cannot be treated as wholly invalid, for the purposes of this case.

If the facts alleged are true, the parties may still be liable to account for the proceeds of the mortgage, as if actually advanced, on the application of the minors, if they have not voluntarily done so. If the consideration had been paid over at the date of its execution, its validity could not have been questioned by creditors, for the owner of property may incumber it; but the result would have been no different, as respects subsequent redeeming creditors. It is not alleged that the incumbrance was excessive. A subsequent lien creditor is entitled to his right to secure the amount of his debt by redemption, if the property is sufficient. He cannot lawfully be deprived of this right by the interposition of apparent and simulated, but spurious, incumbrances. What the exact form of remedy should be, in any particular case, it is not necessary to determine here. But if fraudulently prevented from redeeming, or his right to do so is seriously impaired, his damages would not exceed the amount of his debt and expenses necessarily incurred. The court will not consider the speculative or extra value of the land beyond this, or allow him the benefit of his bargain in addition to the recovery of his debt. case it does not appear that the incumbrance in question was void or excessive, or that the property is not amply sufficient to pay all the creditors, including this mortgage, or that the plaintiff would be willing to surrender the property, if fully reimbursed and his own debt paid.

The purpose of the statute, in providing for redemption by creditors, is to enable them to collect their debts out of the debtor's lands, to the extent of the value of the property over the amount paid to redeem; and when this is effected, and the redemptioner elects to take and keep the property, the object is attained.

We do not hold that a subsequent lienholder can be obliged to pay a debt which the debtor does not owe, and which is not a lien; but if he chooses to do so, and takes no steps to protect himself before redemption, but thereby collects his debt, it is difficult to see wherein he is damaged. He must investigate beforehand, and decide upon the course to pursue; otherwise the courts may be called on, in every case, to investigate the amount actually due on the

claims of prior redemptioners, or as to their validity, in order to increase the value of the estate finally purchased.

Order affirmed.

DICKINSON, J., did not participate in this decision.

(Opinion published 55 N. W. Rep. 118.)

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IVER L. ERICKSON vs. JOHN BRANDT et al.

Argued Oct 28, 1892. Decided April 7, 1898.

Sureties Released by a Change in the Contract of the Principal.

The sureties in a bond of indemnity against liens arising in the course of the construction of a building, under a contract between the owner and contractor, held released by a departure from the terms of the contract in respect to plan and materials.

Vendor need not Convey until Vendee Performs.

Where, by the terms of such contract, the owner of a building agreed with the contractor to convey to him certain real property on the final completion thereof, but such contractor made default in the payment for materials used therein, so that the building became incumbered with liens, held, that the owner was not bound to make such conveyance until the liens were discharged, but was entitled to hold the property for his security.

Seal Imports a Consideration.

A covenant under seal imports a valid consideration.

Appeal by plaintiff, Iver L. Erickson, from an order of the District Court of Hennepin County, Smith, J., made March 18, 1892, denying his motion for a new trial.

Defendant John Brandt contracted with plaintiff August 30, 1890, to make certain alterations and repairs upon plaintiff's house, No. 815 Sixteenth Avenue South, in Minneapolis, and was to receive therefor \$1,050, and a conveyance of two lots in Minnetonka worth \$1,000. Defendants John F. Peterson and Andrew Bergstrom on October 29, 1890, signed a bond as sureties with Brandt in the penal

sum of \$1,500, referring to the contract, and conditioned that if Brandt paid all bills for labor and materials, and held plaintiff's house free from liens, the obligation should be void, otherwise of force.

During the progress of the work upon the house, Brandt and plaintiff modified and departed from the contract without the knowledge or consent of the sureties, and Brandt furnished at plaintiff's request, extra materials and did extra work not provided for in the original contract, amounting in value to at least \$150. The floors were changed from pine to hardwood, an arch was built under the front stairs, a woodshed built onto the rear of the house, new window and door casings put on in the second story, a larger and more expensive furnace put in, and other modifications were made and carried out.

Brandt failed to pay the mechanics and material men, and liens were filed and foreclosed, to the amount of \$1,411.31, which plaintiff paid. He notified the obligors when the action to foreclose was commenced, and requested them to defend. They neglected to do so, and he defended, and incurred expenses and attorney's fees in so doing. He refused to convey the lots until repaid these liens and expenses. He brought this action upon the bond to recover the sums so paid. The Judge directed a verdict for the defendants Peterson and Bergstrom, and charged that attorney's fees incurred in the lien suit should not be allowed. The jury found for the plaintiff against Brandt for \$355.65, and that plaintiff should retain his lots.

Hahn & Hawley, for appellant.

Where a creditor holds an obligation of sureties for the payment of a debt, and at the same time has other security which may be applied to the same purpose, it is the duty of the creditor to hold on to such security and not deliver it to the debtor, for the reason that the sureties are, on payment of the debt, entitled to be subrogated. Erickson could not safely convey these lots to Brandt until these liens were satisfied. If Peterson and Bergstrom were compelled to pay them, they were entitled to have the lots conveyed to them. Plaintiff was therefore correct in refusing to deed to Brandt, and the

direction to return a verdict for the sureties cannot be justified on that ground. Lucas Co. v. Roberts, 49 Iowa, 159; Weik v. Pugh, 92 Ind. 382.

Nor can it be justified on the ground that plaintiff paid Brandt the \$400 before it was due. At most it was but a discharge pro tanto. Kiessig v. Allspaugh, 91 Cal. 231; Law v. East India Co., 4 Ves. 829; Taylor v. Jeter, 23 Mo. 251; Cummings v. Little, 45 Me. 189; Wharton v. Duncan, 83 Pa. St. 40; Barrow v. Shields, 13 La. Ann. 57; Holland v. Johnson, 51 Ind. 346; New Hampshire Savings Bank v. Colcord, 15 N. H. 119; Hurd v. Spencer, 40 Vt. 581; Grow v. Carlock, 97 N. Y. 81; Guild v. Butler, 127 Mass. 386.

It is claimed that the contract with Brandt was modified and altered, and that the sureties are discharged for that reason. trial court so held. But we beg leave to say that the evidence does not clearly show any such thing, and the jury, by the amount of their verdict, most emphatically deny it. The contract was not changed, but only certain minor details of the work, to which Brandt consented, without binding himself to conform to such changes, and without modifying the original contract. We submit this did not release sure-Henricus v. Englert, 63 Hun, 625. Whatever may be the conclusion as to Peterson and Bergstrom, a new trial must be granted as to Brandt, for the reason that Erickson was entitled to his reasonable expenses, including reasonable counsel fees, incurred in the defense of the lien suits; and it was error in the court to refuse to submit that matter to the jury. 1 Sutherland, Dam. 43; Inhabitants of Westfield v. Mayo, 122 Mass. 100; New Haven & N. Co. v. Hayden, 117 Mass. 433; Dubois v. Hermance, 56 N. Y. 673; Ryerson v. Chapman, 66 Me. 557; Call v. Hagar, 69 Me. 521; Allis v. Nininger, 25 Minn. 525.

C. C. Joslyn, for respondents.

The sureties in the bond knew of a certain definite contract between plaintiff and Brandt, and they obligated themselves to protect plaintiff against all liens arising from the work under that contract. It is absurd to contend, as plaintiff does, that this bond was to in-

demnify him against liens for the building of any house which Brandt might thereafter agree to build for plaintiff. After the execution of the bond, plaintiff and Brandt by agreement altered the original contract so as to require the house to be differently constructed, and so as to require extras not provided for in the original contract, costing \$234.75 according to Brandt's testimony, and \$150 according to plaintiff's testimony. This is a substantial amount, where the contract price for the house was only \$2,050, and the alteration constitutes a departure from, and a modification of, the original contract. The sureties are in law thereby discharged. The sureties in such case have a right to say that they are not bound by the old contract, for that has been abrogated by the new; neither are they bound by the new contract, because they are not parties to it; neither can the contract be split into parts so as to be their contract to a certain extent, and not as to the residue. They are either bound in toto, or not at all. Tomlinson v. Simpson, 33 Minn. 443; Simonson v. Grant, 36 Minn. 439; Wager v. Brooks, 37 Minn. 392; Wheaton v. Wheeler, 27 Minn. 464; Allis v. Ware, 28 Minn. 166; Campion v. Whitney, 30 Minn. 177; Bragg v. Shain, 49 Cal. 131; Carson Opera House Ass'n v. Miller, 16 Nev. 327; Judah v. Zimmerman, 22 Ind. 388; Portage Co. Branch Bank v. Lane, 8 Ohio St. 405.

The cases cited by plaintiff all belong to the class in which the creditor has released some collateral security, by which release the surety has been injured, in which case the pro tanto doctrine was properly applied. But among them there is not a single case in which the contract has been modified or departed from by the creditor, and the courts have held that the sureties were not thereby absolutely discharged; or that they were only discharged pro tanto. Plaintiff paid \$400 several months before the completion of the building, and thereby violated the contract, and took it out of the power of the sureties to control the application of the money to the payment of the liens. The plaintiff also neglected and refused to convey the real estate upon the completion of the building, and thereby violated his contract, and deprived defendant Brandt and his sureties of the means of applying the proceeds of said real estate towards the discharge of the liens.

The reason for the fiction that a seal imports a consideration having long since wholly passed away, and the fiction being worse than useless, this case affords this court an opportunity to make some very good law, by holding that the seal does not express the true consideration as required by the statute of frauds. The court instructed the jury that the claim of \$100, for attorney's fees in defending the lien foreclosure suit, need not be considered by them. Brandt made no defense whatever to said claim for attorney's fees, and the court was correct in said instruction.

VANDERBURGH, J. The plaintiff entered into a contract with defendant Brandt, August 30, 1890, for building, repairing, and finishing a house for plaintiff in the city of Minneapolis, according to plans and specifications therein referred to, to be completed November 1, 1890, and for which the plaintiff agreed to pay as follows: \$275 when foundation is completed; \$375 when house is finished outside; and \$400 at final completion of the work,—together with a conveyance of two certain village lots therein described. On October 29. 1890, before the job was completed, the defendant Brandt, as principal, and defendants Peterson and Bergstrom, as sureties, entered into the indemnity bond set forth in the complaint, by them duly sealed, and conditioned as follows: "Whereas the said John Brandt, principal, has entered into a contract with said Iver Erickson for the alteration, construction, and remodeling of said Erickson's house on 16th avenue, in the city of Minneapolis: Now, if the said John Brandt pay all bills for labor and materials performed and furnished in the alteration and construction of said house, and hold said Erickson and the lot on which said house is situated harmless from said bills, and said lot free from liens for labor and material, or for either or both, then this obligation to be void; otherwise, to remain in full force and effect."

At that date the first two installments mentioned in the contract had been paid to Brandt. The job was substantially completed about February 1, 1891, but, by reason of the failure of the defendant Brandt to pay for work done and material used in the building, the premises were incumbered with liens aggregating upwards of \$1,500.

Suit was brought for the foreclosure of one of these lien claims, to which the other lienholders became parties, which suit the defendants herein were duly and seasonably notified by the plaintiff to defend, but they failed so to do, and, the lien having finally been established by the judgment of the court, plaintiff was obliged to settle and pay the same, and he now brings this action to recover the amount so paid, together with costs and counsel fees incurred and paid in the foreclosure action mentioned.

- 1. The defendants Peterson and Bergstrom raise the objection, in limine, that the bond of indemnity shows on its face that it was executed after the contract was made, and is without consideration to support it. It is a sufficient answer to this that the instrument is a covenant by which they have bound themselves under seal, which conclusively imports a consideration. McMillan v. Ames, 33 Minn. 257, (22 N. W. Rep. 612.)
- 2. It is further urged on behalf of the sureties that they are released by reason of alterations in the execution of the work under the contract, made at the instance of plaintiff by defendant Brandt, and without the consent of the sureties after the execution of the indemnity bond. It also appears that the last installment of \$400 was paid before it became due, while there were claims to a large amount outstanding against the building for which liens were filed. it is perhaps doubtful whether, as respects this last point, the sureties can claim a release except pro tanto to the amount of the installment so improperly advanced, yet we think the charge of the court directing a verdict for the defendants, sureties on the bond, may be sustained on the ground of the departure from the plans and specifications referred to. The contract of the surety is stricti juris, and, if a departure from the contract to the extent made in the execution of this one can be disregarded or tolerated, where shall we set the limit?

There were changes made in the construction, not extensive, it is true, but involving different materials and additional labor, which are included in the lien claims established against the building. And in some instances the amount of the increased cost is not clearly de-

fined. We think the changes were correctly held to affect the obligation of the sureties.

Of course, changes affecting the nature of the original contract are to be distinguished from new and independent agreements for extra work, or additions which are entirely separate and independent from the contract for which the cureties are bound; and this distinction has not been overlooked in our consideration of this case.

- 3. After the work was completed, the defendant Brandt demanded a conveyance of the lots which plaintiff agreed to convey to him as a part of the consideration therefor, which the plaintiff refused to give. upon the ground that the liens were not settled. The court was of the opinion, and so charged the jury, that it was the duty of the plaintiff to convey these lots to the defendant when the work was done, and his refusal to do so upon demand rendered him liable for the value thereof, which the defendant Brandt was entitled to set off against the claim of the plaintiff in this action. This we think was Plaintiff was entitled to hold on to these lots for his indemnity, and the defendant could only recover the same or damages for a refusal to convey after full performance on his part, and he had actually indemnified plaintiff for the amount of the liens. As plaintiff alleges his readiness and willingness to make such conveyance. and is not in default while he is entitled to hold the same as security for his advances, he could not be made liable for the value thereof in this action.
- 4. It was Brandt's duty to defend the action brought to enforce the liens. He was the party primarily liable. The plaintiff should therefore be allowed to recover his expenses actually and reasonably incurred in making such defense.

Order denying new trial affirmed as to the defendants Peterson and Bergstrom, and reversed as to the defendant Brandt.

(Opinion published 55 N. W. Rep. 62.)

MARY GRAHAM vs. BRIDGET F. BURCH et al.

Submitted on briefs Jan. 12, 1893. Decided April 7, 1898.

Will not Revoked.

Where an attempted revocation of a will is thwarted by the fraudulent act of a beneficiary, and the testator is subsequently and seasonably informed of the fact, and acquiesces in the preservation of the will, no action will lie for the alleged fraud.

Appeal by plaintiff, Mary Graham, from an order of the District Court of Ramsey County, Kelly, J., made September 24, 1892, denying her motion for a new trial.

James Burns was on January 8, 1887, a widower and the owner of the northerly one hundred and twenty-five (125) feet in length of lot one (1) in block fifty (50) in Dayton & Irvine's Addition to St. The plaintiff, Mary Graham, and the defendant Bridget F. Burch were his children, and only heirs at law. On that day he made and published his last will and testament, and thereby devised the northerly seventy-five (75) feet in length of the lot to Mrs. Burch. her heirs and assigns, and the remainder to Mrs. Graham. left the will with Mrs. Burch for safekeeping. She and her husband. Patrick Burch, lived with him in one of the two houses on the property. The other house was rented to a tenant. In the fall of 1887, he determined to revoke and destroy the will, and asked for and obtained it for that purpose. It was inclosed in an envelope. He was about to start a fire in the cookstove in the house, and placed the envelope containing the will with kindlings in the stove. intending to burn it there when the fire was started. While he was temporarily absent from the room, Mrs. Burch secretly took the will out of the envelope and secreted it, and replaced the envelope in the stove. Her father returned, and the fire was started, and he supposed the will was burned. He died December 23, 1888, agedseventy-three years. Mrs. Burch then presented the will for probate in the Probate Court of Ramsey County. That court refused to admit it to probate and record as his last will. Mrs. Burch appealed v.53 M.-2

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to the District Court, where the decision was reversed. Mrs. Graham then appealed to this court, where the decision of the District Court was affirmed. Graham v. Burch, 47 Minn. 171. The mandate of this court was sent down, and the will was on November 4, 1891, admitted to probate and record, and the St. Paul Title Insurance & Trust Company, a corporation, was appointed administrator of the estate with the will annexed. The estate is still unsettled and in the course of administration. In May and December, 1887, James Burns conveyed all his property to the defendant Bridget F. Burch and her two minor children. These deeds were, at the suit of this plaintiff, set aside after his death, on the ground that they were procured by undue influence. Graham v. Burch, 44 Minn. 33.

Immediately after the will was so finally admitted to probate, this action was commenced by Mary Graham against Bridget F. Burch and her husband to obtain judgment that Mrs. Burch was not entitled to take under the will, and to have her adjudged a trustee ex maleficio for the plaintiff for an undivided half interest in the property, and for partition thereof, and for a receiver meantime, and for such other relief as should be found equitable. The defendants answered, and the trial court found that after deceased so attempted to destroy his will, he learned and knew that the will had not been burned, but was still in existence; and that he never further manifested any desire to destroy it, and died knowing it was in existence. Findings of the facts and conclusions of law were made February 10, 1892, and judgment ordered for defendants, but without costs. Plaintiff made a motion for a new trial, but it was denied, and she appealed to this court.

Stevens, O'Brien & Glenn, for appellant.

Where a devisee, by fraud or force, prevents the revocation of a will, he will in equity be considered a trustee for those who would be entitled to the estate, in case the will were revoked. Gains v. Gains, 2 A. K. Marsh, 190; Riggs v. Palmer, 115 N. Y. 506; New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591; Brook v. Chappell, 34 Wis. 405; Clingan v. Mitcheltree, 31 Pa. St. 25; Blanchard v. Blanchard, 32 Vt. 62; 1 Perry, Trusts, (3rd Ed.) § 181.

In consequence of the view adopted in Graham v. Burch, 47 Minn. 171, this action was brought. The court found the commission of the fraud by the defendant Bridget F. Burch, but also found that the testator, James Burns, knew of the existence of the will before his In the former case Judge Kerr found that the will was kept secreted by the proponent Burch, and that the decedent ever after supposed the same had been then and there burned as he intended. Judge Kelly, upon what seems to us much less satisfactory evidence, finds exactly the contrary. The ease with which an unscrupulous person can produce evidence of the character relied upon in this case to establish Burns' knowledge of the existence of this will after he had attempted its destruction should, we think, be sufficient to place the court upon its guard, not to be swayed by sympathetic credulity. But under the rule of this court, we suppose the finding must stand, and the case must be considered from that aspect. In May and December, 1887, Burns conveyed the property in question to the defendant Bridget F. Burch and her two minor children. These deeds were set aside at the suit of this plaintiff after the death of Burns, upon the ground that they were procured by fraud and undue influence. It is not found by the court that Burns waived the fraud or acquiesced in the result, nor is it found that he had any knowledge of the fraud. The fact is found simply that he knew, before his death, that his will in some way had escaped destruction. And because he did not again attempt to destroy it, the inference is sought to be drawn, that he intended that the will should stand. should he insist upon the destruction of a will that had already become inoperative by reason of the subsequent conveyance of all of the estate thereby devised, and if there was no reason why the will should be destroyed, apparent to the mind of Burns at that time, why should his failure to insist upon an unnecessary formality be held to constitute a waiver of his rights or those of his heirs? The fact that the deeds were set aside after Burns' death in no way adds strength to the idea of a waiver. It cannot be pretended or assumed that Burns knew the deeds were fraudulent, and was proceeding upon the idea that they would be so declared by the court after his death. Undoubtedly Burns died supposing that he had lawfully conveyed all of his property away by deeds to Mrs. Burch and her children; it is not claimed that he did not. He evidently regarded the will as no longer of any effect. To our mind this case presents a practical test whether courts are able to cope with an active, intelligent person bent upon getting an advantage, and indifferent as to the means of doing so.

Cyrus J. Thompson and Thompson, Gates & Thompson, for respondents.

When the will was signed, both daughters were living with their Mary then had three children, all of whom were full grown and abundantly able to support themselves. Bridget had five children, from three to twelve years old, all incapable of caring for them-No division of the property could be made, without a sale, other than as designated in the will. The portion devised to Bridget was the most valuable; but about twenty-seven years before his death, the testator had given to Mary a tract of land then worth \$550. Prior to making the will, Bridget had never received anything by way of advancement from her father. The act of putting the will into a cold stove, when the testator knew that it would not be destroyed for some hours, denoted at most only an intention to have the will destroyed at a future time. The testator discovered the alleged fraud long before his death, and had it in his power to destroy the will, but having made no attempt to do so, it must be that he was satisfied to let the instrument remain intact. The evidence adduced before Judge Kerr, on which findings were made and an appeal heard before this court in 1891, tended to prove that after Burns placed the will in the stove he learned that it had not been destroyed. The evidence to the effect that the testator died in ignorance of the fact, that his will was not destroyed, was wholly irrelevant and immaterial in that action. It was because of its irrelevancy that Judge Kerr was never asked to change that finding of fact. On the other hand, at the trial of this action before Judge Kelly, it was important to ascertain whether or not Burns knew that his will had not in fact been burned; and knew it in ample time to revoke or destroy it. His original attempt to destroy the

will was made to save his daughter trouble, because he thought he had conveyed the land to her, not because he had changed his mind and concluded that she ought not to receive it. What then becomes of the apparent technical fraud which was originally perpetrated? It was waived by the testator in his lifetime with full knowledge of all the facts, and no estoppel can arise, nor can respondent be chargeable with a trust by reason of it. The general doctrine of trusts is well stated in appellants' brief, but we think it has no application here.

VANDERBURGH, J. The contest grows out of the attempted revocation of a will which was under consideration in Graham v. Burch, 47 Minn. 171, (49 N. W. Rep. 697.) It is sought by this action to charge defendant as trustee ex maleficio of the plaintiff for that portion of the estate received by defendant, under the will attempted to be destroyed by the testator, which plaintiff would have been entitled to had he died intestate, on the ground that the revocation of the will was prevented by the fraudulent conduct of the defendant. must turn upon the effect to be given to certain findings of fact in this case in reference to the subsequent discovery by the testator that the will had not been destroyed, and his acquiescence in the preservation of the will. The attempt to destroy the will was made in It is found that he at that time believed that his will had been burned and destroyed, and that the defendant Burch fraudulently induced him so to believe by concealing from him the fact that she had removed the will from the envelope containing it, and replaced the envelope in the stove in which he had placed it to be burned; "that the testator continued thereafter to live in the same house with defendant, who was his daughter, until December 23, 1888, when he died; and that after the time said James Burns, the testator, so attempted to destroy his will, and before the time of his death,—but exactly at what date does not appear,—said James Burns learned and knew that his said will had not been destroyed, but that the same was still in existence, and that he died with that knowledge, and without manifesting any further desire of making any further attempt to destroy the will."

The plaintiff admits that there is evidence in the case sufficient to support these findings. The defendant testifies that his attention was particularly called to it, and that he saw the will many times afterwards, and during the last summer of his life he assured her she would have no trouble about the property, because she had got "the deed and the will." It appeared that a deed which he had given her of the property in controversy was afterwards set aside, on the ground that it was procured by undue influence. The court below properly ordered judgment for the defendant upon the facts The testator, intending to destroy the will, placed it in an envelope in a stove, expecting it would be destroyed when the fire was lighted therein, which was not done for several hours. mean time it was abstracted by the defendant. There was clearly a locus penitentiae; so that if it was subsequently taken out, and with his knowledge and consent thereafter remained intact, he must be deemed to have ratified her act, and to have abandoned his purpose to destroy it. He might change his mind before it was destroyed. and, if he became cognizant of the facts, it would make no difference whether he took it out of the stove himself or it was done by another person, and afterwards reported to him.—Non fit volenti injuria."

The conclusion of the trial court in the case is therefore supported by the facts found.

Order affirmed.

(Opinion published 55 N. W. Rep. 64.)

JAMES E. FLANIGAN vs. HENRY U. SEELYE et al.

Submitted on briefs Jan. 6, 1893. Decided April 7, 1898.

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Discharge of Mortgage.

A mortgage running to several mortgagees jointly to secure a joint debt may be paid to and released by either mortgagee.

Tender of Payment.

A tender to either is good, and is operative as to the interests of all the mortgagees.

Appeal by plaintiff, James E. Flanigan, from an order of the District Court of Hennepin County, *Pond*, J., made September 26, 1892, denying his motion for a new trial.

The plaintiff is an attorney at law, and as such performed services for Mattie Hewitt. He brought an action against her to recover compensation, and on July 19, 1890, recovered judgment for \$454.40. A writ of execution was issued August 25, 1891, and under it, the sheriff levied upon and sold October 5, 1891, to plaintiff, for \$525. a large amount of furniture and household goods at Nos. 27 and 29 South Main street, East Minneapolis. The defendant Nettie Seelye owned the house, and she and her husband, the defendant Henry U. Seelye, had formerly owned the goods, but on August 25, 1890, they sold the goods to Mrs. Hewitt, and rented to her the house. Hewitt on that day made and delivered to them a mortgage on the goods, to secure the payment of \$6,000. There remained unpaid \$1,138.22 January 27, 1892, and on that day defendants gave notice of sale of the goods to pay this balance and \$50 attorney's fees and the expenses of the sale. Plaintiff thereupon offered to pay the debt and attorney fees and all expenses, and testified that he tendered to Henry U. Seelye \$1,300 for that purpose, and that Seelye rejused to receive the money and refused to deliver the goods. They were sold February 10, 1892, under a power in the mortgage, and bid in by Mrs. Hewitt surrendered to the defendants the possesdefendants. sion of the house and of the goods. After this sale, plaintiff again demanded the goods of Nettie Seelye, and being refused, brought this

action to recover their value, claiming the tender extinguished the lien of the mortgage. Some of the goods sold on plaintiff's execution were claimed by third parties, merchants who had made sales to Mrs. Hewitt, with the condition that the title should not pass until the price should be paid. At the trial the judge charged the jury that the tender to defendant Henry U. Seelye did not have the effect of discharging the mortgage, and that the refusal of one of two mortgagees to accept the amount due upon the mortgage, did not operate to discharge the interest of the other. The jury returned a verdict for defendants, and the court refused to grant a new trial.

James E. Markham, for appellant.

The chattel mortgage was held and owned by the defendants jointly, to secure the payment of a joint debt. Payment could be made As between the mortgagees, he who receives payment is a trustee for the benefit of all who have an interest in the fund; but this does not concern the mortgagor, who may deal with one as representing all. Jones, Mortg. § 958. A tender may always be made to the person who is authorized to receive payment. In general it should be made to the person who has the legal estate and the right to reconvey, or to enter satisfaction of the mortgage. Jones, Mortg. § 896. Even where the mortgage has been assigned, a tender to the original mortgagee, the person apparently entitled to receive payment, will be effectual, unless the person making the tender has actual or constructive notice of the assignment. Dorkray v. Noble, 8 Me. 278; Hetzell v. Barber, 6 Hun, 534. The effect of the tender made by the plaintiff to the defendant, Henry U. Seelye, and his refusal to accept the same, was to discharge the lien of the mortgage. Moore v. Norman, 43 Minn. 428.

Penney, Jamison & Hayne, for respondents.

It is claimed by plaintiff that, having succeeded to the rights of the mortgagor, he made a tender of the full amount due on the mortgage to the defendant, Henry U. Seelye, and urges that this was sufficient in law, and discharged the lien of the mortgage.

The proof should be clear that the tender was fairly made, and

deliberately and intentionally refused by the mortgagee, before he is adjudged to have forfeited his lien on the chattels. Moore v. Norman, 43 Minn. 428; Jones, Mortg. § 900. Nettie Seelye was the owner of the house where the property was located. She rightfully took possession of it after it had been vacated by Mrs. Hewitt. She found this property there. In order to charge her and the defendant Henry U. Seelye with conversion, demand must be shown. But on this point the evidence was conflicting. Plaintiff testified that he made demand, and the defendants that he did not. Under these circumstances this court should not disturb the verdict, so long as the Judge who tried the case is satisfied with it, and refuses a new trial.

Vanderburgh, J. Defendant Nettie Seelye took possession of premises belonging to her upon the surrender of a lease. In the house thereon was a large amount of personal property, a portion of which belonged to plaintiff, subject to a chattel mortgage running to defendants, Nettie and Henry Seelye, to secure a joint debt due them. Of the balance some belonged to the plaintiff, and some either belonged to or was claimed by third parties.

The evidence tended to prove that before the commencement of the action, and before the foreclosure of the mortgage, the plaintiff tendered the amount due thereon to the defendant Henry U. Seelye, one of the mortgagees, and notified him that he should thereupon claim the property covered thereby, and that he also subsequently made a similar claim and demand of the property from the defendant Nettie Seelye, after the foreclosure, and after she took possession thereunder. We think there was an issue for the jury both as to the tender to Henry U. Seelye and the refusal of the money by him, and the demand of the mortgaged property by the plaintiff before suit brought; but, in view of the harsh rule invoked by the plaintiff, the court very properly suggested that the evidence of tender and refusal should be clear and convincing.

We think, however, that the court erred in refusing to charge the jury that a tender to one of two joint debtors and mortgagees was sufficient. On the contrary, the court charged the jury that such

tender should have been made to both mortgagees. But their interest is joint and individual. You cannot compel a discharge by either without paying the whole debt; but by payment of the whole debt to either the mortgage is discharged. You may therefore pay to either. Either may receive payment and discharge the mortgage, and a tender of payment to either is good. Oatman v. Walker, 33 Me. 67; Jones, Mortg. §§ 896, 958.

The creditor, receiving payment, becomes a trustee for all having an interest in the fund. A tender to one, if operative at all, must be followed by certain legal results as to the property mortgaged. Obviously it could not operate to release an individual interest. It would release all or none. While the evidence would justify the court in sending to the jury the question of the sufficiency of the demand made by plaintiff to indicate that plaintiff claimed possession of the mortgaged property on the ground of the tender and refusal, as respects the rest of the property claimed by him it is not so clear that the demand was sufficient, in view of the claims of third persons to a portion thereof, to identify what he was entitled to in case the jury should find he did not own it all.

Unless he owned all the furniture demanded, it seems to us that the defendants' objection to the sufficiency of the demand was well taken.

Order reversed and new trial granted.

(Opinion published 55 N. W. Rep. 113.)

ALFRED H. HEDDERLY vs. EDWARD W. BACKUS.

Argued Jan. 20, 1893. Decided April 7, 1893.

Verdict for Defendant Ordered.

Held that, upon the undisputed evidence, defendant was entitled to a verdict.

Bailee's Fraudulent Sale of the Chattel, Gives no Title.

The custody of personal property by a bailee is consistent with the title of the owner, and, in the absence of conduct on the part of the owner operating to mislead a purchaser, the latter can acquire no title through a fraudulent sale by the bailee.

Appeal by plaintiff, Alfred H. Hedderly, from an order of the District Court of Hennepin County, Smith, J., made August 22, 1892, denying his motion for a new trial.

By his complaint the plaintiff alleged that the defendant, Edward W. Backus, on September 26, 1891, at Minneapolis, took, carried away and converted to his own use a certain dark bay stallion, three years old, worth \$1,000, belonging to plaintiff, to his damage that sum, and he demanded judgment for that amount. Defendant denied that the plaintiff owned the horse. On the trial it was shown that J. C. McNaughton on April 3, 1891, sold the horse to plaintiff and gave him a bill of sale. On the same day plaintiff employed Mc-Naughton to board and train this horse and two others owned by him, and left all three of them with McNaughton for that purpose. Defendant then proved that Frank Thurston of Lake Crystal raised and owned the horse, and on October 18, 1890, sold him to defendant, and sent him by rail to defendant at Minneapolis, and that defendant employed McNaughton to keep and train the horse. On April 17, 1891, defendant paid McNaughton \$63.75 for keeping and training the horse, and took him away. McNaughton died September 26, 1891, and soon after plaintiff demanded the horse of the defendant and brought this action. At the trial after the evidence was all given, the Judge directed the jury to return a verdict for defendant. It was done, and plaintiff appeals.

L. R. Larson, for appellant.

The case should have been submitted to the jury. It was error for the judge to direct a verdict for defendant. There was evidence to sustain a verdict for plaintiff. Cochran v. Stewart, 21 Minn. 435; Globe Milling Co. v. Minneapolis Elevator Co., 44 Minn. 153; Nixon v. Brown, 57 N. H. 34.

White & Egelston, for respondent.

It is conceded that McNaughton was in the custody of the horse at the time he undertook to sell him to plaintiff. Proof of possession, unexplained, creates the presumption of ownership, but it is a mere presumption, the lowest species of evidence, and it is liable to be overthrown by any evidence showing the character of the possession, and that it is not necessarily as owner. By undisputed evidence introduced by both parties, McNaughton's possession was explained, and he was shown to be a mere bailee for hire. Rawley v. Brown, 71 N. Y. 85; Lowery v. Erskine, 113 N. Y. 52. The custody of the property by McNaughton as a matter of law stands for nothing, and it was not error in the court, to refuse to submit that question to the jury.

VANDERBURGH, J. The undisputed evidence, we think, would require the jury to find that the horse in controversy belongs to the defendant.

It is clear that his title is superior to that of plaintiff. He purchased the horse of one Thurston on the 18th day of October, 1890, and paid \$1,000 for him.

He was turned over to one McNaughton to keep for the defendant. It is true that McNaughton, who procured a subsequent bill of sale of the horse of Thurston, assumed to sell the horse to the plaintiff in April, 1891, while in possession of him, for the sum of \$130, but no title did or could pass by that sale. The fact that McNaughton held the horse as bailee of the defendant did not give him colorable authority to sell, nor work an estoppel against defendant.

His custody as bailee was entirely consistent with the defendant's

ownership. Rawley v. Brown, 71 N. Y. 85; Lowery v. Erskine, 113 N. Y. 52, (20 N. E. Rep. 588.)

The possession of McNaughton, while evidence of ownership, was, of course, not conclusive; and it does not appear that defendant held him out as owner, or acquiesced in his claim of ownership, or, by any act or omission of his, misled the plaintiff, to his prejudice. Plaintiff, therefore, purchased of McNaughton at his peril, and must look to him, or his legal representatives, for his damages.

It is also true that, in the fall of 1890, defendant, having learned that McNaughton had a subsequent bill of sale of the horse from Thurston, and that he had made a bill of sale of him to one Bruce, paid the latter \$100, to avoid a lawsuit. But we fail to see any connection between this circumstance and the plaintiff's title to the horse, or that it is any evidence in support of it, since it was clearly established that defendant's title was, in any event, prior and superior to that of McNaughton, or any one claiming under him. Plaintiff failed to make a case for the jury, and the court properly directed a verdict for the defendant.

Order affirmed.

(Opinion published 55 N. W. Rep. 116.)

Application for reargument denied April 19, 1893.

Frank Mullin vs. Northern Mill Co.

Argued Dec. 16, 1892. Decided April 24, 1893.

Personal Injury, from Negligence.

Where a mechanic, whose general duty it was to assist in making repairs in a sawmill, was directed to replace a chain, which had fallen from its place on a wheel, and which was operated in connection with a dangerous machine, claimed not to have been properly covered or guarded, and in which he was injured while engaged in working near it, held, upon the evidence in the case, that the questions of defendant's negligence, considered as the proximate cause of the accident, and of plaintiff's contributory negligence, were for the jury. Held, also, that the evidence



was sufficient to sustain a finding that he was properly engaged, as a servant of the defendant, in the course of his employment when the accident occurred.

Appeal by defendant, the Northern Mill Company, from a judgment of the District Court of Hennepin County, Smith, J., entered August 4, 1892, against it for \$3,074.75.

The plaintiff, Frank Mullin, was on October 29, 1890, employed by the defendant, a corporation, in its sawmill at Minneapolis as a blacksmith, repairing the ironwork, and keeping its tools in condition. While at work on that day putting the rosser chain in place on a sprocket wheel, his right leg was so injured that it was necessarily amputated above the knee. He claimed that his injury was caused by the carelessness and negligence of the defendant in omitting to properly house and cover the revolving knives of the rosser. He had a verdict April 28, 1892, for \$3,000, on which judgment was entered.

Kitchel, Cohen & Shaw, for appellant. Christensen & Tuttle, for respondent.

VANDERBURGH, J. This action is brought to recover damages for a personal injury suffered by the plaintiff while at work in defendant's sawmill. The plaintiff was at the time attempting to replace a chain used to draw logs up through a "siding machine" upon a "sprocket wheel," by means of which the chain was operated. This wheel was about twenty inches in diameter, and was furnished with strong teeth, which caught the links of the chain successively, and thus pulled the logs through the machine. The machine was used to cut off the bark from the logs preparatory to sawing, and was composed of two revolving adjustable discs, with projecting knives, between which the logs passed. Slides or ways were constructed, along which the logs passed beyond the wheel. The wheel was situated about four and a half feet in the rear of the machine. There was a sheet-iron cover upon the upper side of the frame, upon which the discs were supported and operated, with a semicircular opening, eighteen inches in diameter, through which the logs passed on the slide or ways. On each side of the slide next the machine there had been placed blocks or skids, called "guides," because they were intended to keep the logs in place on the slide as they emerged from the machine. They were about eight inches high, eight inches wide at the bottom, and were beveled off on the inside, so as to adapt their shape to their use as "guides" for the logs. the apron fit over the guides, slots or openings were cut therein, so that when they were removed the hole in the apron was that much enlarged in size, and the risk of accident and injury from the revolving knives correspondingly increased. If the chain ran off the wheel mentioned, it would cease to move until replaced. accident to plaintiff occurred in October, 1890, and he was at the time working as a blacksmith in the mill, where he had been so engaged since April preceding. The mill was operated both day and It was towards evening when the accident occurred, and the mill was lighted up for the night. Just prior to the accident the chain ran off the wheel, and rested on the shaft by the side thereof, and the operator of the machine called on the plaintiff to fix the chain on.

All the material points raised by the appellant are necessarily involved in its request to the court to direct a verdict upon the evidence in its favor, which was refused. Included in these are the questions chiefly discussed by the counsel for the appellant in his brief,—that of the defendant's negligence and plaintiff's contributory negligence, the assumption of the risk by him, and whether his interference was entirely beyond and outside the duties of his employment, so that the defendant owed him no duty in the premises.

1. The first and most serious question in the case is that of defend-While plaintiff ant's negligence as related to the injury in question. was engaged in attempting to replace the chain upon the wheel, occupying a position between the machine and the wheel, his foot slipped into the open space left in the cover in the condition it was then in, and was caught and destroyed by the knives. It is evident that the machine, when in motion, was quite dangerous to anything coming within the range of the knives, and it was proper that it should be covered for the protection of employes working around it, as they might frequently be required to do; but an imperfect protection might be more dangerous (because misleading) than no covering at all. Craver v. Christian, 36 Minn. 413, (31 N. W. Rep. 457.) The plain-"I went there to get that chain on. I was called up tiff testifies: to fix the chain. I took an iron bar, and pried the chain over.

stood as close to the wheel as I could. I tried to pry the chain over, I was out by the wheel. and the chain slipped out, and away I went. · I was standing in this way, [indicating.] My foot went in sidewise." The "slide" was sixteen to eighteen inches from the wall of the mill, and the plaintiff's testimony tended to show that the position he occupied while attempting to raise the chain upon the wheel was the proper one. The situation of the premises, the character of the machine, and its condition, and the manner in which it was operated, the likelihood of accidents, and the danger which might reasonably be expected to be incurred in and about the same, taken together, make the case one, we think, proper for the consideration and practical determination of the jury. As practical men of affairs, they were in a better position than this court can be to judge of the effect of the absence of the guides, which plaintiff's evidence tended to prove had been removed before the accident. The person operating the machine and directly in charge of it must be presumed to know whether they were present in place or not, and since, in such matter, he represented the master, no further notice of the defect or increased danger was required.

2. There is still less doubt as to the propriety of the submission to the jury of the questions of plaintiff's contributory negligence, or the assumption of the risks by him. He was called on to act promptly while the mill was running and operatives waiting. He says he supposed the machine had been stopped, since the chain was off, and the logs were not coming through. The mere turn of a lever would stop it, without affecting other machinery. What he did, and what position he occupied, and whether he knew the condition of the machine, or ought to have known the danger, whether under all the circumstances his conduct was negligent, were matters for the jury.

There were many things to be considered, and how a reasonably prudent man should proceed in such an emergency could best be determined by them.

3. The court was asked to rule that the plaintiff was a mere volunteer in doing the work in which he was engaged when he was injured, and we are to determine whether the court erred in submitting the question to the jury.

We think there is evidence in the case reasonably tending to show that the work was not beyond the scope of his employment, or, in any event, that he was acting at the time under the direction of defendant's authorized agent. At the time of the accident neither the millwright nor foreman was in the mill. The mill was running and lighted for the night, and there were forty workmen. And the evidence tends to prove that in a case like this, when a machine got out of repair, it was the duty of the man in charge to see that it was put in repair. The foreman, who was not present at that time, testified: "Whenever anything broke of that kind the man that ran the machine or the millwright fixed it. If the millwright was not there, when I was not there, the machine would lie still until I came, if he could not do it himself, or get some assistance to do it." Plaintiff had been previously required to assist in repairing the chain, and in this case he responded in good faith to the call of the operative to put it in place.

Under such circumstances, to prevent a suspension of work in the mill we are unable to see why the practical common-sense rule should not apply which would authorize the operative of the machine to call for assistance upon any one of the employes whose business it was to assist in making repairs.

Order affirmed.

(Opinion published 55 N. W. Rep. 1115.)

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Susie HAEG et al. vs. Fred HAEG et al.

Argued Jan. 17, 1898. Decided April 24, 1893.

Delivery of Deed.

Where a deed is duly executed and delivered to a third party in the lifetime of the grantor, to be delivered after his death to the grantee named therein, it will be held a good delivery on the happening of the contingency, and to relate back so as to divest the title of the grantor, by relation, from the first delivery.

Findings Sustained by the Evidence.

Evidence considered, and held sufficient to justify a finding by the trial court that the deed in controversy was delivered to a third person in the lifetime of the grantor, to be delivered to the defendant on or immediv.53m.—3

ately before the decease of such grantor. *Held*, also, that the evidence justified the conclusion of the trial court that the deed in question was duly executed and acknowledged by the wife of the deceased grantor, with knowledge of its contents and his purpose in making it, and its final delivery acquiesced in by her.

Appeal by plaintiffs, Susie Haeg and others, minor children of Charles Haeg, deceased, from an order of the District Court of Hennepin County, *Hooker*, J., made September 24, 1892, denying their motion for a new trial.

On July 17, 1889, Charles Haeg was the owner of about three hundred and forty acres of land in Hennepin county, a lot in Minneapolis, and a quarter section of land in Kandiyohi county. day he and his wife executed deeds of all this land, dividing it among his children. The deed to defendant, Fred Haeg, one of his adult sons, purported to convey to him forty acres of the land in Hennepin county. Charles Haeg also signed a memorandum stating that the deeds were to be delivered to the grantees therein named, immediately preceding the time of his death, or, in case of a failure to so deliver them, they were to be delivered as soon after his death as possible. The deeds and this memorandum were placed by him in an envelope and deposited in the box where he kept his papers in the Safe Deposit Vaults of the Minnesota Loan and Trust Company in Minneapolis. His friend Edward B. King was with Haeg and wife when the deeds were executed, signed them as a witness, and went with him and assisted to place them in the vault. Haeg at the same time requested King to see that the deeds were delivered to the children at his death, and King promised him to Charles Haeg died Intestate February 3, 1891. The day before his death his wife sent for King and he came. though very sick and able to talk but little, requested King to "look out for the boys." After Haeg's death, King and the widow, on February 13, 1891, went to the vault and obtained the deeds and delivered them to the several grantees. She paid the taxes on the land and had the deeds recorded. On February 24, 1891, the grantees assigned and released to the widow all their claims to the personal estate of the deceased, about \$4,000 in value.

On October 31, 1891, a guardian ad litem was appointed for the plaintiffs, and this action commenced to cancel and set aside the

deed to the defendant Fred Haeg, and the record thereof, on the ground that it was never delivered. The action was tried April 29, 1892, and findings made and judgment ordered, that plaintiffs were not entitled to any relief.

George S. Grimes and E. A. Campbell, for appellants.

The deeds were never delivered by Charles Haeg and were never out of his possession or control during his lifetime. Their delivery by King and the widow after Haeg's death was ineffectual for any purpose. A deed must be delivered in the grantor's lifetime. A delivery after his death is of no effect. No title can be derived from such a deed. Prutsman v. Baker, 30 Wis. 644; Cook v. Brown, 34 N. H. 460; Porter v. Woodhouse, 59 Conn. 568; Huey v. Huey, 65 Mo. 689; Byars v. Spencer, 101 Ill. 429; Anderson v. Anderson, 126 Ind. 62; McElroy v. Hiner, 133 Ill. 156; Stilwell v. Hubbard, 20 Wend. 44; Younge v. Guilbeau, 3 Wall. 636; Jackson v. Phipps, 12 John. 418; Jackson v. Leek, 12 Wend. 105; Bovee v. Hinde, 135 Ill. 137; Maynard v. Maynard, 10 Mass. 456.

A conditional delivery can only be made by placing the deed in the hands of a third person to be kept by him until the happening of the event upon which the deed is to be delivered to the grantee. Fisher v. Hall, 41 N. Y. 416; Vreeland v. Vreeland, 48 N. J. Eq. 56; Fain v. Smith, 14 Oregon, 82; Stone v. French, 37 Kan. 145; Duraind's Appeal, 116 Pa. St. 93.

The doctrine that an undelivered deed intended to take effect as a testamentary disposition will be upheld in a court of equity, has been overruled or repudiated in every state where the question has been passed upon within the last fifty years.

Shaw & Cray, for respondent.

No particular form is necessary to the delivery of a deed. It may consist in an act without words, or in words without any act. Goodell v. Pierce, 2 Hill, 659; Wallis v. Wallis, 4 Mass. 135; Tooley v. Dibble, 2 Hill, 641; Warren v. Swett, 31 N. H. 332; Hathaway v. Payne, 34 N. Y. 92; Burkholder v. Casad, 47 Ind. 418; Dayton v. Newman, 19 Pa. St. 194. Delivery is a question of intention always. It is sufficient if there be an intention or an assent of the mind to

treat the instrument as a deed. Shaw v. Hayward, 7 Cush. 170; Foster v. Mansfield, 3 Met. 412; O'Kelly v. O'Kelly, 8 Met. 436; Crawford v. Bertholf, 1 N. J. Eq. 458; Stewart v. Redditt, 3 Md. 67; Stevens v. Hatch, 6 Minn. 64; Rivard v. Walker, 39 Ill. 413; Tallman v. Cooke, 39 Iowa, 402; Ruckman v. Ruckman, 32 N. J. Eq. 259; Dukes v. Spangler, 35 Ohio St. 119.

This deed was delivered to a third person as fully as were the instruments in the following cases: Ruggles v. Lawson, 13 John. 285; Stone v. Duvall, 77 Ill. 475; Squires v. Summers, 85 Ind. 252.

Neither actual manual delivery nor change of possession are required to constitute effectual delivery. By determining what the intention of the grantor was, and by regarding the particular circumstances of the case, it must be decided whether or not the delivery is valid. Shirley v. Ayres, 14 Ohio, 308; Scrugham v. Wood, 15 Wend. 545; Newton v. Bealer, 41 Iowa, 334.

Vanderburgh, J. The plaintiffs and defendants are the widow and children of Charles Haeg, deceased, late of Hennepin county, and his sole heirs at law.

The deceased and the plaintiff Albertina Louisa Haeg, his wife, in his lifetime, and on the 17th day of July, 1889, executed certain deeds of conveyance of his real property, in separate parcels, to his several children, parties to this action, intending thereby to make a division thereof among them. Among these deeds was one running to the defendant Fred Haeg as grantee of the forty-acre tract in controversy here. These deeds he intended to have delivered to the several beneficiaries just before or immediately after his decease, which subsequently occurred, on 3d day of February, 1891.

The deeds were not in fact actually delivered to the grantees until after his decease, and on this ground, and the further ground also insisted on by the plaintiffs, that they were not in his lifetime delivered to or placed in the custody of a third party, in trust to deliver to the grantees at the appointed time, they claim that they never took effect as conveyances, and they therefore ask to have the same set aside and annulled.

We will first inquire whether the record discloses evidence tending to show that the deeds were placed in the control, custody, or possession of a third party, with instructions to deliver them to the grantees named, in pursuance of his declared purpose, and sufficient to support a finding of such delivery to him. We observe that no objection is made to the form or sufficiency of the findings of the trial court, and no claim is made by the plaintiffs' counsel in their brief that the delivery to such party was in escrow, nor any point made that the second or final delivery to the defendants was dependent on the performance of any condition.

As just suggested, we are to consider simply, on this branch of the case, under the issues made and the briefs of counsel, the sufficiency of the evidence to justify a finding in defendants' favor on the point We are not to consider whether the case made in defendsuggested. ants' favor is strong or weak, for if there is evidence, as we think there is, reasonably tending to show such delivery, this court will not reverse the trial court upon the question. O'Kelly v. O'Kelly, 8 Met. 439. If the deed was duly executed, and was delivered to such third party (in this case one Edward B. King) in the lifetime of the grantor, to be delivered after his death to the grantee, it was a good delivery upon the happening of the contingency, and related back, so as to divest the title of the grantor, by relation from the first delivery. O'Kelly v. O'Kelly, supra; Foster v. Mansfield, 3 Met. 412. It appears that the deceased grantor in this case had definitely determined upon the division of his property among his children, as provided by the deeds in question, as early as the year 1889, and it was so understood between him and his wife and other members of his family; and he accordingly employed an attorney to prepare the deeds, and, as the court finds, they were duly executed and acknowledged by himself and wife on the 17th day of July, 1889, and he then and there made an arrangement with King, who was an old acquaintance, to see that they were delivered to the grantees immediately before his death, or as soon thereafter as possible.

And it further appears that, on the same day, he and King, who was present at his request, went together to Minneapolis with the deeds, and deposited them, inclosed in a separate envelope, in a box in the safety vault of the Minnesota Loan & Trust Company, rented by deceased, and that King then and there agreed to deliver the deeds as requested by the deceased; and subsequently, while on his deathbed, the latter again urged him not to forget the obligation.

Soon after the decease of the grantor, King went, in company with the plaintiff widow, to the vault of the Minnesota Loan & Trust Company, and took out the deeds, and proceeded to deliver them, as previously agreed, to the grantees, including this defendant. clear that the arrangement was understood beforehand by all the parties, and that the box in which the deeds were deposited for safekeeping was to be accessible to King to enable him to carry out his agreement with the deceased, and make final delivery to the grantees. For the purpose of his trust the deeds must, under the findings of the court, be regarded as placed in his custody, and the record is sufficient to support the finding of a delivery for such purpose. very clearly that such was the intention of the grantors in the deeds, and it would be a very narrow and technical construction to adopt, in order to defeat these deeds, to hold that, because the deeds were deposited in the manner stated in the safety vault, the final delivery was void for want of a previous delivery to King; and, as said by the court in Foster v. Mansfield, supra, it is not necessary to consider what would have been the effect if the grantor had recovered from his sickness, and finally taken back his deed.

He did not change his mind, and his conduct shows that his purpose and intention were unalterably and finally fixed and settled when he executed the deed and made the final arrangement with King.

In respect to the claim made, that the deeds were executed by the wife of the deceased under a mistake of her legal rights or the nature of the transaction, it is enough to say that the evidence abundantly sustains the finding of the trial court that she was fully informed of the grantor's purpose in making the deeds, and knew what property was included therein, and that she executed the same freely and voluntarily, and was present and assisted in the delivery to the grantees, and fully acquiesced in the mode adopted by her husband for the division of his estate.

The decision of the trial court is in accordance with the justice and equity of the case, and must stand. As these findings are controlling, we deem it unnecessary to notice other points made in the case.

Order affirmed.

(Opinion published 55 N. W. Rep. 1114.)

MINNA PETZOLD vs. CHARLES PETZOLD et al.

Submitted on briefs April 4, 1893. Reversed April 24, 1893.

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Fraud upon a Donor not Sufficiently Stated to Raise a Trust.

Upon a conveyance of real estate to one person for a consideration paid by another, no trust can arise in favor of any one, not a creditor of the person paying, unless the conveyance was made to the grantee named, without the consent of the person paying, so as to be a fraud upon him.

Such Fraud should be Expressly Alleged.

In a complaint to enforce such assumed trust, the fact of want of such consent ought to be expressly alleged, and not left to inference from other allegations.

Appeal by defendant Charles Petzold, from an order of the District Court of Ramsey County, William Louis Kelly, J., made February 19, 1892, overruling a demurrer to the complaint.

The complaint states that the plaintiff, Minna Petzold, is the daughter of the defendant Adam Krass, and the wife of the defendant Charles Petzold. That they were married November 23, 1884, and lived together until May 10, 1890. That in October, 1886, Krass bargained for lots one (1), two (2), twenty-three (23) and twenty-four (24) in block four (4) in plat eight (8) Lexington Park, St. Paul, and paid \$2,100 therefor, and made improvements thereon of the value of \$2,000 more. That it was understood that the title to said real estate should be taken in the name of the plaintiff and her husband jointly, but that the husband, with intent to deprive plaintiff of her share, fraudulently caused the title to be conveyed to him alone, and that plaintiff did not discover the fact until about December 15, 1887. That plaintiff and her father were both unable to read or write the English language, and intrusted the business to the husband. That the property was to be the joint property of the plaintiff and her husband, and a gift from her father to them jointly. That the husband now refuses to allow plaintiff to share in the property, and has so misused her that she was compelled to leave him. She asks judgment for an undivided half of the property and costs. The husband demurred, on the ground that the complaint does not state facts sufficient to constitute a

cause of action. The demurrer was overruled, with \$10 costs, and permission was given to answer within twenty days. From that order the husband appeals.

C. D. & Thos. D. O'Brien, for appellant.

There is no allegation in the complaint that the taking of the property in the name of the husband alone was contrary to the wishes of the donor, Krass, or that the same was done without his knowledge. It is true that he is alleged not to have been conversant with the English language, but it is not alleged that he ever demanded or required that the property should be in the joint names of Petzold and his wife. There could be no fraud upon the plaintiff unless her rights were of such character that she could have enforced them as against Krass, unless Krass was equally deceived. Krass does not join the proceedings as a plaintiff, but is joined as a defendant, though no relief is asked against him. As the promise to the plaintiff was made by Krass, and not by defendant Petzold, no trust arose between husband and wife which she can enforce as against him.

M. F. Propping and Francis H. Clarke, for respondent.

Krass appears to have desired to give the property to his daughter and her husband jointly. It is alleged that there was an understanding between the three to this effect.

If the gift by Krass was intended for both jointly, then it became the property of both jointly when Krass, in making the donation, had divested himself of it. It was then no longer his, and it belonged to those to whom he gave it. The disposition of it thereafter was a matter between the donees, who, in this case, are alleged to be the plaintiff and the defendant Petzold. But it is alleged that the defendant Petzold committed a fraud on the plaintiff; that by means of that fraud he intended to deprive the plaintiff of her rights in the property, and that he carried out his wrongful and fraudulent intention; that thereby he wrongfully obtained the title to said property in his own name. Krass was deceived, but he was not defrauded in the sense of being deprived of this property. The defrauded person was the plaintiff. The defendant Petzold took plaintiff's property in his own name, and this he did

fraudulently, as the complaint alleges. But he could not take from plaintiff by fraud that which her father gave her and intended she should have. The fraud made the act by which he sought to deprive her of her own, void.

GILFILLAN, C. J. No trust in favor of plaintiff, or in favor of any one not a creditor of Krass in the real estate which is the subject of controversy, could arise upon the sole facts that the consideration for its purchase was paid by Krass, and the conveyance taken to defendant Petzold. As the money paid belonged to Krass, and plaintiff had no legal interest in it, he could do what he pleased with it, and, if he paid it for a conveyance to Charles Petzold alone, no one can complain. No trust could arise upon the conveyance unless it was taken to Charles Petzold alone, against the consent of Krass, so as to be a fraud upon him, so as to defeat the intention with which he paid the money. From the allegations of the complaint, it might be argued or conjectured that such was the case, though those allegations are not necessarily inconsistent with the fact that when he paid he knew of, and consented to, the conveyance running to Charles Petzold. So important a fact as that he did not consent, being the only foundation upon which a claim in behalf of plaintiff could rest, ought not, in pleading, to be left to argument or inference, but ought to be expressly stated, so that a direct issue may be made upon it. For want of such an allegation the complaint was bad.

Order reversed.

VANDERBURGH, J., took no part in this decision.

(Opinion published 54 N. W. Rep. 933.)

EDWARD C. GRAN et al. vs. CHARLES SPANGENBERG.

Argued April 11, 1898. Decided April 24, 1898.

Wrong Order of Argument to Jury without Prejudice.

Though a defendant was strictly entitled to close the argument to the jury on the trial below, a new trial will not be ordered because the closing was given to the plaintiff, unless the court can see that the defendant may have been prejudiced thereby.

Imperfect Receipt Aided by Figures on it.

Where in a written instrument a number is attempted to be expressed in words, and it is evident a word has been omitted,—a numeral, for instance,—and there are on the instrument figures evidently intended to also express the number, they may be resorted to, to ascertain the omitted word.

Order Affirmed by Equally Divided Court.

The judges of this court being equally divided on the question whether certain error could have been prejudicial, the order appealed from is for that reason affirmed.

Appeal by defendant Charles Spangenberg, from an order of the District Court of Washington County, W. C. Williston, J., made July 25, 1892, denying his motion for a new trial.

The plaintiffs Edward C. Gran, Edmund R. Bristol and Lando F. Gran were partners in business, and in 1891 drilled and tubed a well for defendant, and sold him a windmill, and set it up over Their bill amounted to \$364.50. They admitted that the well. defendant had paid them \$216.86 upon the account, and they brought this action to recover the balance, \$147.64. Defendant answered that he had paid them in full. That was the only issue between the parties. Defendant testified that he paid them \$100 October 30, 1891, and \$50 November 27, 1891. These two payments the plaintiffs denied. Among the payments which plaintiffs admitted was one of \$50, made December 23, 1891, and for which they gave a receipt dated that day. The defendant claimed that when he made that payment the plaintiffs gave him a receipt for \$150 to cover that and the previous payment of \$100 made October Plaintiffs admitted the signature to the receipt, but claimed it was given for only \$50 paid on its date, and that it had been since altered by writing in the words, "hundred an," and by inserting the figure "1" before the "50" on the upper left-hand corner. The original receipt was produced in this court upon the argument. When the evidence was all given, the Judge directed that defendant's counsel should address the jury first. To this ruling defendant excepted. The judge charged the jury among other things that the receipt was prima facie evidence of the payment of fifty dollars and of no more, and to this defendant also excepted. The jury returned a verdict for plaintiffs for \$153.13. Defendant moved for a new trial, and being denied appeals.

Otto K. Sauer, for appellant.

On the trial defendant was required by the court to open the case to the jury, as the affirmative of the issue was upon him. But when the testimony was all in, the court required the defendant to go to the jury first, notwithstanding the affirmative of the only issue in the case, together with the burden of proof, was upon him. 1878 G. S. ch. 66, § 227, (4th.) This statute was framed for the purpose of giving to that person upon whom the burden of proving an affirmative fact rests, the opportunity of addressing the jury after the one who denies that fact. Whether the party be technically "plaintiff" or "defendant" can make no difference, as the statute should be construed in accordance with the reasons underlying it and which prompted its enactment. Paine v. Smith, 33 Minn. 495. It was an abuse of discretion to require defendant's counsel to address the jury first, and must be presumed to have been prejudicial.

This receipt has not been changed. It is the same as when received from Lando F. Gran. This receipt was first made out by Gran for the sum of fifty dollars paid on December 23, 1891, and was changed by Gran before delivery, and made to read as it now shows. Defendant reminded Gran of the payment of one hundred dollars made October 30, and for which he had no receipt, and asked Gran to change it, and he did so.

The charge that the receipt is evidence of the payment of fifty dollars and no more cannot be sustained. What that receipt is, and for what amount it was given, are questions of fact for the jury. Wilson v. Hayes, 40 Minn. 531.

J. C. Mangan and Geo. H. Sullivan, for respondents.

In the case of Payne v. Smith, 33 Minn. 495, this court ruled that, although a party is erroneously deprived of the advantage of closing the argument to the jury, this court would not interfere, unless there was ground for believing that he was injured thereby. The same rule has been followed in C. Aultman & Co. v. Falkum, 47 Minn. 414; Griffiths v. Wolfram, 22 Minn. 185; Second Ward Sav. Bank v. Shakman, 30 Minn. 333; Hartman v. Keystone Ins. Co., 21 Pa. St. 466.

In a written instrument like a note, bill of exchange or receipt, where there are figures on the margin and written words in the body, expressing the amount, if there is a conflict, the written words in the body govern and control. Daniel, Negotiable Inst. (4th Ed.) § 86; Hollen v. Davis, 59 Iowa, 444; Norwich Bank v. Hyde, 13 Conn. 297; Commonwealth v. Emigrant Industrial Sav. Bank, 98 Mass. 12; Garrard v. Lewis, 10 Q. B. Div. 30; Payne v. Clark, 19 Mo. 152; Riley v. Dickens, 19 Ill. 30; Fisk v. McNeal, 23 Neb. 728; Johnston Harvester Co. v. McLean, 57 Wis. 258.

The receipt has no definite amount in writing in the body thereof except fifty dollars, and was not prima facie evidence of the payment of any other or greater sum than fifty dollars. The figures "\$150" were no part of the instrument. Upon a consideration of all the evidence the jury found that this payment of one hundred dollars was not made.

The issue as to the payment of \$50 on November 27th was also found in favor of plaintiffs, and no error is here urged in respect to that finding. This alone shows that the jury did not believe, that defendant had paid that fifty dollars, and that they discredited his testimony generally. The charge of the court in reference to the receipt, that it was not a receipt for more than \$50, did not influence the jury on the question whether \$100 was paid October 30th. They were guided by the fact that the defendant's testimony, as to the receipt and as to the payment, was not worthy of belief.

GILFILLAN, C. J. We are unable to agree upon a result in this case. The order in which a trial shall be conducted is to some

extent in the discretion of the trial court, and, unless its direction as to such order may have prejudiced a party, a new trial will not be ordered because of such direction. The defendant, having the affirmative on the evidence, was strictly entitled to close the arguments to the jury; but the issue was so simple and brief that the closing argument could hardly have been an advantage, and we cannot see that giving the closing to the plaintiffs could have prejudiced the defendant.

We are agreed that the trial court erred in its charge that the receipt of December 23, 1891, conceding it to be wholly genuine, was for only \$50, and was evidence of payment of no more than that sum. The receipt, as it now appears, was as follows: "\$150. St. Paul, Dec. 22, 1891. Received of C. C. Spangenberg hundred an fifty dol-Gran, Bristol & Gran, L. T. G." It is not to lars, on account. be supposed that the words "hundred an" were used without meaning anything by them. It is evident some word—some numeral was omitted, it must be presumed, inadvertently. No one could read the receipt without concluding some hundred - one, two, or three, for instance—was intended. Where it is clear a word had by mistake been omitted from an instrument, the court will resort to anything in, or which was put on it, which points to the omitted word, in order to ascertain what it was. In this case the figures indicate the omitted word to be "one." It is true that where words and figures are used to express the same number, and they do not agree, the words must prevail. That is because people are more liable to mistake in writing figures than words. is not this case. The words alone show there was a mistake. sorting to the figures to ascertain what word was omitted does not make the figures prevail over the words.

But upon the evidence, and having the original receipt before us, two of the judges are of the opinion, in which the other two do not concur, that the jury could not have found that the figure 1 after the dollar mark and the words "hundred an" were in the receipt when it was delivered by plaintiffs to defendant, nor that they were inserted by, or with the knowledge of, plaintiffs. If they were not, then no prejudice could result to defendant from the error in the charge, and a new trial ought not to be ordered be-

cause of it. As we cannot agree that defendant could have been prejudiced by the error, the order refusing a new trial must be affirmed.

Vanderburgh, J., absent, took no part in the case.

(Opinion published 54 N. W. Rep. 983.)

MARY M. GOWAN vs. HANNA J. BENSEL.

Submitted on briefs April 4, 1898. Decided April 24, 1893.

A Tenant's Possession after His Landlord's Title Ends.

When the title to real estate of one whose tenant under a lease is in possession passes under execution sale, such former owner is no longer in possession so that an action in ejectment can be maintained against him.

A General Allegation is Controlled by Specific Facts Pleaded.

The general allegation, in a complaint in ejectment, that defendant wrongfully detains the possession, is of no effect as against specific facts showing he is not in possession.

Appeal by plaintiff, Mary M. Gowan, from an order of the District Court of Chippewa County, Gorham Powers, J., made October 14, 1892, sustaining the demurrer of defendant Hanna J. Bensel, to the complaint.

The plaintiff for cause of action stated that, in 1879, Roderick W. Dunn died intestate, owning a house and lot in Montevideo, and leaving his widow, Hanna J. Dunn, and two children, his only heirs at law. That the widow subsequently married Charles D. Bensel. That plaintiff recovered judgment November 4, 1881, against Hanna J. Bensel for \$1,014.49. That a writ of execution was issued thereon, and defendant's one-third interest in the house and lot was sold by the sheriff January 18, 1890, to plaintiff for \$1,390, and she received a certificate of the sale. No redemption was made. The defendant Joseph Gaskill was in possession of the property as the tenant of Mrs. Bensel and her son Silas R. Dunn. The complaint further stated that plaintiff on January 20, 1891, notified Gaskill that she was the owner of an undivided third of the prop-

erty and demanded that he pay her one-third of the rent. Gaskill refused to pay and refused to deliver possession. That the possession of one undivided third of the property is wrongfully and unlawfully detained from plaintiff by Gaskill and Mrs. Bensel, to plaintiff's damage \$150, and she asked judgment for the possession of one undivided third of the property and for damages and costs.

Defendant Hanna J. Bensel demurred on the ground that, as to her, the complaint did not state facts sufficient to constitute a cause of action, and the trial court sustained it.

Alva Hunt, for appellant.

The direct allegation in the complaint that the defendants wrongfully and unlawfully withhold the possession from the plaintiff, is a sufficient allegation of a present wrong, to put the defendant upon her defense, requiring affirmative matter, if any she has, which would interfere with plaintiff's right to possession.

C. D. Bensel, for respondent.

A complaint which shows defendants to have been lawfully in possession at the time plaintiff's title accrued, but states no facts showing that defendants have since unlawfully withheld possession from plaintiff, does not state a cause of action for the recovery of the property. Holmes v. Williams, 16 Minn. 164, (Gil. 146;) Merrill v. Dearing, 22 Minn. 376.

GILFILLAN, C. J. Action in ejectment. The facts alleged in the complaint, so far as they affect defendant Bensel, are, concisely stated, that she and one Dunn were prior to January 18, 1891, owners of the real estate in controversy, and leased the same to defendant Gaskill, who entered into, remained, and at the commencement of the action was in, possession; that Bensel's title, being to an undivided third, on said date passed to and is now in plaintiff by virtue of a sale on execution, and afterwards plaintiff gave Gaskill notice thereof, and demanded that he pay one-third of the rent to her, which he refused to do.

Whatever may be plaintiff's remedy against Gaskill, she cannot maintain the action of ejectment against Bensel, for the reason, if there were no other, that the latter is neither actually nor con-

structively in possession. While the relation of landlord and tenant existed between her and Gaskill his possession was her possession, but, when that relation ceased by her title passing to plaintiff, she was no longer in possession through Gaskill as tenant. The general allegation that the possession is wrongfully and unlawfully detained by defendant is of no effect as against the specific facts showing where the possession is.

Order affirmed.

VANDERBURGH, J., took no part in this decision. (Opinion publishe i 54 N. W. Rep. 934.)

WILHELMINA LIND vs. CHRISTOF LIND ct al.

Submitted on briefs April 4, 1893. Decided April 24, 1893.

Presumption of the Continuance of Ownership.

Ownership of real estate proved or admitted to have existed is presumed to have continued till it is shown to have ceased.

Appeal by Wilhelmina Lind, from a judgment of the District Court of Le Sueur County, Francis Cadwell, J., entered November 2, 1892.

The plaintiff alleges that she is the owner in fee of an undivided half of the east half of the northeast quarter of section thirty-five, T. 110, R. 23, in Le Sueur county, and has a life estate for her own life in the other undivided half, and that she is in possession of the land; that Christof Lind and five others, defendants, claim an adverse estate and interest in, and lien upon, the undivided half held by her in fee, which claim is invalid, and she asks that all adverse claims of the defendants be adjudged invalid.

The defendants answer that Ludwig Lind was in his lifetime the owner of the land in fee, and plaintiff was his wife; that it was occupied by them, and was his homestead; that he died intestate May 8, 1888, and the defendants are his children and only heirs at law; that the land has been rented by plaintiff; and that her tenant is now in possession. Defendants further answer that when deceased married plaintiff he was seventy-four years old, infirm

and illiterate and mentally incompetent to contract; that plaintiff soon after the marriage obtained by fraud his signature to a conveyance of an undivided half of the land; that he discovered the fraud before the deed could be recorded, and demanded its surrender, and it was returned to him; and that he destroyed it with plaintiff's consent. Defendants ask judgment that they own the eighty acres subject to the widow's life estate.

Plaintiff, by her reply, admits that Ludwig Lind was in his lifetime, and prior to his marriage to her, the owner of the land in fee, and that she became his wife, and the land their homestead, and that the defendants were his children, and that he died intestate May 8, 1888. She alleges that Ludwig Lind, on the day of, and prior to, their marriage, conveyed to her an undivided half of the land in fee. She denies that any fraud or deceit was practiced upon the grantor. She admits that he soon after obtained and destroyed the deed, and alleges that he did so without her knowledge or consent. She denies each and every other allegation of the answer.

The issues were by consent referred to Eli Southworth for trial. Plaintiff proved her possession by her tenant, and rested. evidence was given by either party, and the referee held on the pleadings, that plaintiff had a life estate in the land for her own life, and the defendants the remainder in fee, and ordered that judgment be entered accordingly. Judgment was entered by the clerk on the report, to the effect that plaintiff is not the owner of the premises described in the complaint, and that the defendants are the owners and were at the time of the commencement of the No application was made in the trial court to correct this judgment and make it conform to the report of the referee. In a memorandum, the referee states in substance that his construction of the answer is, that it alleges facts from which it follows that the husband died seised of the land, that the reply admits those facts, and then alleges a conveyance by him just prior to his mar-This allegation of a conveyance the law puts in issue, without further pleading. Plaintiff on the trial gave no evidence of such conveyance, and for that reason failed in the action. possession was under her life estate, and hence not adverse, nor was it any evidence of title in fee.

v.53 M.-4

M. R. Everett and H. S. Gipson, for appellant.

Possession, without other proof of her interest, entitles plaintiff to maintain this action under 1878 G. S. ch. 75, § 2. Knight v. Alexander, 38 Minn. 384; Barber v. Evans, 27 Minn. 92.

The only admission in the reply, of ownership in Lind at any period whatever, is that prior to the date of their marriage Ludwig Lind, deceased, owned the premises. That Lind ever owned the land at any other or subsequent period is put squarely in issue by the general and specific denial of the reply. A party claiming as heir must show that his ancestor died seised of the premises. Martin v. Boyce, 49 Mich. 125.

The judgment as entered adjudges that plaintiff has no right, title or interest in the undivided half of the premises; when the answer concedes, and the referee finds, she has a life estate therein. There was no authority for entry of such a judgment, excluding plaintiff from her life estate.

H. J. Peck, for respondents.

Plaintiff's possession was not such a holding as is prima facie evidence of title. Lindley v. Groff, 37 Minn. 338; Vaughan v. Bacon. 15 Me. 455; Campau v. Campau, 44 Mich. 31; Culver v. Rhodes, 87 N. Y. 348; Wilder v. City of St. Paul, 12 Minn. 192, (Gil. 116.)

GILFILIAN, C. J. Action to determine adverse claims to certain real estate; plaintiff claiming to be in possession, to have the fee to an undivided half, and a life estate and homestead right in the other undivided half. The cause was tried by a referee. The evidence before him amounted to nothing, so that he had to decide the cause on the facts admitted in the pleadings. It is admitted that plaintiff and Ludwig Lind intermarried in 1874; that, at the time of or immediately before the marriage, Ludwig was the owner of the real estate, and continued the owner of at least an undivided half thereof till his death, and that he and plaintiff lived upon and occupied the real estate as a homestead till, in 1888, he died intestate, leaving plaintiff his widow, and the defendants, Christof, Michael, Elizabeth, Catherine, and Phoebe, his children and heirs at law; and that plantiff occupied the real estate as a homestead for some time thereafter.

When ownership of real estate is shown to have existed at any time, it is presumed to have continued until it is shown to have ceased. Plaintiff's admission in the reply that at or immediately before the marriage, in 1874, Ludwig owned the land in fee, with the presumption, established the allegation in the answer that he died seised, there being no facts admitted showing that his ownership of any part of or of any interest in it ceased. Of course the allegations in the reply of a conveyance by him to plaintiff, being new matter, were put in issue by operation of law, and the answer, while it admits that he signed a deed, denies that it was delivered; so that the matter stood for proof, which was not made.

Plaintiff's possession was sufficient to justify her in bringing the action, and calling upon defendants to allege and prove their title. This they do by showing, as already stated, that their ancestor died seised.

The judgment as entered does not follow the direction for judgment in the referee's decision, but that is error of the clerk; and the proper remedy is, in the first instance, by application to the court below.

Judgment affirmed.

VANDERBURGH, J., took no part in this decision.

(Opinion published 54 N. W. Rep. 934.)

E. J. Cour vs. Lyman E. Cowdery et al.

Submitted on briefs April 10, 1893. Decided April 24, 1893.

Defective Return by a Justice of the Peace on Appeal.

A judgment of a justice, appealed to the district court on questions of law alone, cannot be reversed merely because the justice, having been requested to do so, has not returned all the evidence. The party's remedy in such case is by proceedings to compel a full return.

Appeal by plaintiff, E. J. Cour, from a judgment of the District Court of Dodge County, *Thomas S. Buckham*, J., entered March 28, 1892.

This action was commenced September 22, 1891, before George B. Arnold, a Justice of the Peace of Dodge County, against defend-

ants Lyman E. Cowdery and J. G. Wheeler, to recover \$35 balance due for an elevator-bootpan, made by the North Star Iron Works and delivered to the defendants. Plaintiff was assignee of the The defendants answered that the pan was warranted to be made of good materials and water-tight; that it was in fact made in part of old and poor materials, and was not water-tight; that by reason of the breach of the warranty, they sustained \$35 dam-After hearing the evidence, the Justice rendered judgment for defendants. The plaintiff appealed to the District Court on questions of law alone, and requested the Justice to return all the He made return to the District Court December 8, 1891. but included only a small part of the evidence given before him on Plaintiff obtained an order for an amended return. Justice made a further return March 1, 1892, stating his recollection of the substance of the evidence, and stating that no request was made on the trial that he take down the evidence in writing; that he did not do so, and could not then recollect or return the greater part of the evidence given; that it was impossible for him to make a correct or full return of the evidence.

No further return was asked by either party, and the case was submitted for decision upon the merits. The trial court affirmed the judgment of the Justice, saying: "Under this condition of things, this court cannot disturb the result reached by the Justice on the ground that the evidence did not warrant the judgment rendered, even if no effect is given to the evidence to support it set forth in the second return."

Willis A. McDowell, for appellant.

If a Justice cannot, or will not, send up the evidence, the case should be reversed. An unsuccessful litigant is entitled to a review of his case on the evidence introduced before the Justice if he so elects, without having such review prevented by a Justice anxious to sustain his decision in the case. Robison v. Medlock, 59 Ga. 599.

The evidence returned should have been considered, so far as to ascertain whether on it the Justice could properly render the judgment he did. *Croon quist v. Flatner*, 41 Minn. 291.

S. T. Littleton, for respondent.

The District Court must decide the appeal on its merits as presented by the return of the Justice. If the appellant fails to get all the evidence returned and submits his case on the return as made, it must be decided on that return. The presumption is that the Justice decided rightly. To reverse, error must be shown. If the evidence is not all returned, the presumption is, that if it were returned, it would support the judgment of the Justice.

GILFILLAN, C. J. Action commenced before a justice of the peace, and, after judgment for defendant, appealed on questions of law alone to the district court, where the judgment of the justice In the notice of appeal from the justice the appellant was affirmed. requested him to return all the evidence. Upon the first return it did not appear whether all the evidence was set forth, and the appellant procured an order from the district court requiring the justice to return all the evidence, and the justice made a further return, in which he sets forth some further testimony, not according to the exact language, which he says he is unable to state, but, as we understand it, according to its substance. On these returns the parties went to a hearing in the district court without any objection, so far as the record shows.

The district court held that, because all the evidence was not returned, it could not disturb the result on the ground of insufficiency of the evidence. It would not have been justified in reversing on the evidence in the returns, it being sufficient to sustain the justice's finding; and as the court reached a right conclusion, even though the reason may have been wrong, its decision must stand.

The appellant appears to claim that, if the justice (being requested by appellant) fail to return all the evidence, the judgment must for that reason be reversed. That certainly cannot be so. It would be a reversal of the rule that error is not presumed, but must be shown. For failure to return the evidence in full the remedy of either party is by application to compel the justice to return it, and if either claims that certain evidence, not returned, was in fact given, he may undoubtedly have an order requiring the justice to return specifically whether or not that evidence was given, in sub-

stance, at any rate, though he may not be able, from not having kept minutes, to certify to the exact language.

We do not see any merit in the other assignments of error. Judgment affirmed.

VANDERBURGH, J., took no part in this decision. (Opinion published 54 N. W. Rep. 935.)

ALVIN A. MEISTER et al. vs. R. P. RUSSELL et al.

Submitted on briefs April 10, 1893. Decided April 24, 1898.

54 340

New Trial.

the case.

Upon an appeal from a justice on questions of law alone the district court may, after a decision, reconsider and modify its first decision of

Docket Entries in Justice Court.

The omission of a justice to state in his docket the fees due to each person separately, as required by 1878 G. S. ch. 65, § 7, subd. 8, does not render the judgment erroneous.

District Court may Modify the Judgment Appealed from.

On such an appeal the district court may modify the judgment where the erroneous part is severable from the remainder.

Appeal by defendant, Peter P. Swenson, from a judgment of the District Court of Hennepin County, William Lochren, J., entered November 30, 1892.

The plaintiffs Alvin A. Meister and Seymour L. Meister, of La Crosse, Wis., commenced this action July 28, 1892, in the court of a Justice of the Peace, against R. P. Russell and Peter P. Swenson, to recover the possession of an iron safe, a letter-press, and a show case, taken by Swenson, as sheriff, on a writ of execution against the property of their father, S. A. Meister, who was managing the St. Charles Hotel in Minneapolis. The property was taken from the sheriff by the coroner, and on receiving bond he redelivered it to the sheriff. Defendant Russell was not served and did not appear in the action. The plaintiffs filed their complaint with

the Justice, stating that they owned the property, that its value was \$90, and that defendants had taken it from their possession. They asked judgment for its return, or for \$90 the value thereof, in case a delivery could not be had. On the trial August 27, 1892, before the Justice, the plaintiffs had judgment that they were owners of the property, and that defendant Swenson return it to plaintiffs, and in case a return could not be had that plaintiffs have judgment against him for \$92, the value thereof, and that plaintiffs recover of defendant \$14.65 costs and disbursements. No statement of the items of these costs and disbursements was entered in the docket.

Defendant Swenson appealed to the District Court, on questions of law alone. On September 28, 1892, that court ordered that the judgment of the Justice be reversed, on the ground that it was for two dollars in excess of what was demanded in the complaint, and because the Justice failed to enter in his docket the items of cost due to each person separately. On October 7, 1892, plaintiffs gave notice of a motion for a new trial, for errors of law occurring on the trial, and on the ground that the order for judgment was not justified by the return and was contrary to law. This motion was heard October 15, 1892, and a new trial granted. On reargument, the judgment of the Justice was modified by striking out two dollars from the adjudged value of the property. In all other respects it was affirmed. Judgment was entered in the District Court November 30, 1892, that plaintiffs are the owners and entitled to the possession of the property, and in case a return thereof cannot be had, that they recover of defendant Swenson and H. J. Saunders, the surety on his appeal bond, the sum of ninety dollars, the value of the property, and that plaintiffs also recover their costs and disbursements, taxed at \$27.43.

From this judgment defendant Swenson appeals to this court.

C. E. Brame, for appellant.

Merrick & Merrick, for respondents.

GILFILLAN, C. J. This is an action in replevin, commenced before a justice of the peace, and, after judgment for plaintiff, removed to the district court by appeal on questions of law alone.

The defendant answered before the justice without making the

objection made here, to wit, that the writ was not served by the proper officer; so it was waived.

The complaint alleged the value of the property at \$90. This was put in issue, and the justice found it to be \$92, and, the property not having been delivered to plaintiff, entered judgment in his favor for the return of the property, and, in case a return could not be had, for its value, \$92, and for the costs, stated in gross at \$14.65. On a hearing before the district court it ordered judgment reversing the judgment of the justice because of the excess of the \$2 above the value stated in the complaint, but on a motion by plaintiff for a rehearing or new trial it modified the judgment by striking out the \$2, leaving it to stand for the \$90.

The appellant objects that the district court had no authority to reconsider and modify its first decision. The authority is fully given by 1878 G. S. ch. 66, § 125.

He objects, also, that the justice's failure to state the fees due to each person separately, as required by 1878 G. S. ch. 65, § 7, subd. 8, rendered the judgment erroneous. The entry of the fees separately is not required to be in the judgment, and is no part of it, but is to be a separate entry in the docket, like many other such entries required to be made. The omission to make any one of them does not make the judgment erroneous, though probably a party to the action may insist upon the justice making the omitted entry.

As an appeal on questions of law under our system of procedure is for the correction of error, we have no doubt that upon an appeal from a justice on questions of law the court may, if the erroneous part of the judgment be severable from the remainder, reverse as to the erroneous part, leaving the remainder to stand; in other words, may modify the judgment so that it shall be correct.

Judgment affirmed.

VANDERBURGH, J., took no part in this decision.
(Opinion published 54 N. W. Rep. 935.)

Louis Lundell vs. Charles Ahlman et al.

58 57 77 515

Submitted on briefs April 13, 1893. Decided April 24, 1898.

Review of Order Granting a New Trial.

Held that, on the evidence, an order setting aside findings of fact will not, under the rule of decision of this court, be reversed.

Lien Statement, Last Item not Proved.

That the last item stated in a lien statement is not proved is not fatal to the whole claim, provided the statement was filed within the specified time after the last item stated in it and proved.

Appeal by defendant, the Scottish-American Mortgage Company, (Limited,) from an order of the District Court of Hennepin County, Charles M. Pond, J., made April 15, 1892, granting a new trial.

The plaintiff, Louis Lundell, commenced this action to foreclose a mechanic's lien upon two houses in Minneapolis. He made all other lien claimants and the owner, Charles Ahlman, parties defendant. He also made the Scottish-American Mortgage Company (Limited) a defendant, as it had taken mortgages upon the property August 15, 1890, which under the decisions of this court were second and junior to plaintiff's lien. The trial court found that the lien statements of defendants were not filed until January 10, 1891, more than ninety days after the delivery of the last items, and for that reason the liens were lost. The defendant lienholders moved for a new trial, claiming the storm sash and transom were parts of their bills, and were delivered within ninety days prior to filing the lien claims. The court granted the new trial, and the Mortgage Company appeals from the order.

W. W. Clark, for appellant.

Gray & Pulliam, for respondents.

GILFILLAN, C. J. The preponderance of the evidence in this case was not so manifestly and palpably in favor of the findings that, within the rule of decision of this court in such cases, we can reverse the order granting a new trial. It seems conceded that, if the item of storm sash delivered as to one of the houses on December 26th, and of storm sash and transoms delivered as to the other



December 6th, belonged in and were part of the account with the other items delivered for each house,—that is, if they came within and were delivered pursuant to the same agreement or arrangement to furnish material for each house,—then the lien statement in each case was seasonably filed for record. It seems that as to each house the owner, when beginning to build, made a list or bill of what is called "mill work," that he supposed would be needed, and a gross aggregate price was agreed on for each bill, but that it was at the same time understood that whatever extra articles of mill work might be needed the respondents would furnish whenever ordered, and such extras were furnished as, from time to time, they were ordered. Such extras properly belonged in the same account with the articles in the bill, the only questions that could be made being, were they agreed to be delivered, and were they delivered, for constructing and completing the same building? the fact that considerable time elapsed between the delivery of the articles in the bill and the ordering of the extras would make no As storm sash are a proper part of a well-constructed house in this climate, the court might have found them to have been furnished as extras, pursuant to the agreement,-might, indeed, have found either way upon it. It is also difficult to reconcile with the evidence the court's finding as to one of the houses (we think the one called the "North House") that it could not from the evidence find the date of the delivery of the last item, (excluding those of December 26th.) It would be, we think, hard upon the evidence to avoid the conclusion that the date of such last item was October 14th.

As the only purpose of requiring the date of the last item to be stated in the lien statement is to show whether it is filed in time, the failure to prove such item cannot be fatal to the entire claim, provided the statement is filed within the specified time after the date of the last item stated in it and proved.

Order affirmed.

Vanderburgh, J., took no part in this decision. (Opinion published 54 N. W. Rep. 936.)

HERMAN L. MEYER et al. vs. WILLIAM BERLANDI.

Argued April 18, 1893. Decided April 24, 1898.

Pleading, Order of.

In an action for extras upon a building, which was constructed under a contract for a gross price, if the complaint do not set out the contract, and it contain anything to defeat or diminish the claim for extras, it is for the defendant to set it up in his answer as a defense, and then for plaintiff in his reply to set up any matter in avoidance.

Contract Prevails over Inconsistent Specifications.

A building contract provided a mode of determining as to extras; the specifications, referred to by and made a part of it, provided a different and inconsistent mode. *Held*, that in the contract prevails.

A Provision of a Contract Waived.

Where the parties proceed throughout in entire disregard of such a provision, they must be held to have waived it.

Evidence Offered, Properly Excluded.

A party, while examining a witness, offered a document, saying that he offered it "in connection with the testimony of the witness." Held that, as it could not possibly have any effect to explain or support such testimony, an objection that it was immaterial was properly sustained, even though the document contained evidence which might be material if offered generally.

Verdict Sustained by the Evidence.

Evidence held to sustain a verdict.

Appeal by defendant, William Berlandi, from a judgment of the District Court of Ramsey County, William Louis Kelly, J., entered September 1, 1892, against him for \$1,358.08.

Henry Wegmann and Henry Klemann, on February 11, 1887, made a contract with plaintiff to furnish the materials and build for him, above the foundation walls, a two-story brick building in West St. Paul, according to certain drawings and specifications. He agreed to pay them therefor \$11,700. Defendant, during the progress of the work, directed many alterations and deviations from the original contract and specifications, and required of them extra work and materials. He paid the contract price. They assigned to plaintiffs, Herman L. Meyer and William Thompson, their claim for the extra work and materials, and they on April 1, 1892, brought

this action to recover \$3,873.20 therefor. They obtained a verdict May 24, 1892, for \$2,030.60. Defendant moved for a new trial which was denied, on condition that plaintiffs remit the excess, over \$1,358.08. This they did and judgment was entered for that amount. "Exhibit 19" mentioned in the opinion, was a bill of extra work and materials, furnished the defendant by the contractors. The discussion in this court was principally upon the evidence, whether it supported the verdict, and as to the materiality of portions thereof.

Warner, Richardson & Laurence, for appellant. James E. Markham, for respondents.

As it is beyond dispute that the contract GILFILLAN, C. J. price for constructing the building was paid, the first cause of action set forth in the complaint need not be considered. causes of action are for extra work and material, and in their statement there is nothing to indicate that the claim for such items was controlled or affected in any way by the terms of the building If that contract contained anything to defeat or diminish the claim for extras, it was for the defendant to allege it in his answer as a defense, and then for plaintiffs to set forth in their reply matter in avoidance of that defense. The answer sets forth the contract and the specifications, and claims that by the terms thereof the matter of extras was to be submitted to the arbitration of the architect, or of two arbitrators, one to be chosen by defendant, the other by the contractors, the assignors of plaintiffs, the two arbitrators, if they could not agree, to choose a third, and that except upon such arbitration there could be no claim for extras, and alleges that there had been none, except as to some items presented by the contractors and agreed on by them and defendant, in the presence of the architect. To this the reply alleges that, when requested by the contractors to submit the extras claimed to the decision of the architect or arbitrators, the defendant refused This was a sufficient avoidance of the alleged matter of defense so that there was no basis for defendant's motion, before any evidence was introduced, that all evidence be excluded except as to the contract price and as to the extras admitted by the answer.

The contract, which is separate from, but refers to and makes a part of it, the plans and specifications, provides that the owner may at any time direct in writing such alterations and deviations from the plan as he may desire, and that such deductions from or additions to the time of performance and the contract price as the parties at the time shall agree on in writing shall be made; and, if they cannot agree, then it shall be decided by two builders, one to be chosen by each of the parties, and such builders, if they cannot agree, shall choose a third person, not the architect, and his decision shall be binding. The specifications provide that the architect shall decide on the quantity, quality, and value of all materials and work furnished, offered, omitted, claimed as extra, or furnished by owner at his option, unless a price for each item is agreed on in writing beforehand.

These provisions are inconsistent, because they designate different and inconsistent modes of deciding on the same matters, and the question is, which shall prevail? We think the provisions in the contract itself ought to prevail, because it is to be presumed the plans and specifications were prepared first, and that what the parties set down in the contract is the last expression of what their minds settled down to on the matter, and also because, it being matter of contract, the natural place for it, and where one would naturally look for it, is in the contract, and not in the specifications.

Whether the allegations in the reply that the defendant refused to submit the extras to arbitration were proved or not is immaterial, for the reason that there was no question on the evidence, and no question of pleading was made upon it at the trial, that both parties entirely disregarded the stipulations in the contract as to alterations, deviations, and extras, not merely as to the mode of ascertaining the values thereof, but the requirement that the request therefor should be in writing. They proceeded throughout without any reference to those stipulations, and must be held, therefore, to have waived them.

The only ground of objection stated to the witness Wegmann's referring to defendant's "Exhibit 19" to refresh his recollection was that it was made by him September 1st, which was at or about the time of doing the work,—indeed, as some of the evidence indicates, while it was going on. That it was properly verified was not hinted

at as an objection, and of course cannot be considered now. The objection was properly overruled.

Afterwards defendant, when the architect as his witness was under direct examination, offered in evidence the same exhibit, stating that he offered it "in connection with the testimony of this witness." The witness had not testified with reference to anything contained in it, but had just stated, on its being shown him, that it was the first time he had ever seen it. From the purpose of the offer as stated the court had a right to assume, and doubtless did, that it was offered to explain or support the testimony that the witness had given, and, as it could not possibly have any such effect, it rightly sustained an objection that it was immaterial. the defendant claimed, as he does now, that it contained evidence favorable to him, he ought to have offered it generally, in which case the court would have been called on to examine it, and see whether it contained material evidence, or at least ought not to have indicated such a qualification of the purpose with which he offered it.

The other assignments of error are as to the sufficiency of the evidence. It was clearly sufficient to sustain the verdict, as it was when cut down by the court below.

Judgment affirmed.

(Opinion published 54 N. W. Rep. 987.)

53 62 56 77

LEVI M. STEWART vs. SWEET W. CASE et al.

Argued April 17, 1898. Decided April 24, 1898.

Assessors not Civilly Liable for Official Acts.

The rule exempting judicial officers from civil actions for their decisions and acts in that capacity, however erroneous and by whatever motive prompted, extends to assessors in assessing property for taxation.

Appeal by plaintiff, Levi M. Stewart, from an order of the District Court of Hennepin County, *Thomas Canty*, J., made October 1, 1892, sustaining a demurrer to the second, third and fourth causes of action stated in the complaint.

The plaintiff, by his complaint, stated for a second cause of action that in 1886 he was the owner of certain lots in block eightytwo (82) in Minneapolis; that the defendant Sweet W. Case was assessor, and the defendant William B. Jones was assistant assessor of the city; that they wrongfully conspired for the purpose, and with the intent to injure, cheat and defraud him, and to assess, and in pursuance thereof did in that year assess, his said property at the sum of \$173,100. That such assessment was excessive, and an overvaluation of at least \$50,000. That this was done without his knowledge or consent, and that he was compelled thereby to pay and did on May 30, 1887, pay \$865 in excess of what he should have legally and justly paid as taxes upon said property. That plaintiff did not discover the facts until after he had paid the money, and that he thereby sustained damages in said last-mentioned sum.

The third and fourth causes of action were for a similar conspiracy and overvaluation of other lots in said city owned by plaintiff, whereby he was compelled to and did pay \$1,040 in excess of what he should have legally and justly paid as taxes thereon, to his further damage said last-mentioned sum. He demanded judgment for these sums with interest.

The defendants demurred to these causes of action, and the demurrer was sustained, and plaintiff appealed.

F. F. Davis, for appellant.

A civil action will lie whenever the plaintiff is aggrieved or damnified by unlawful acts done by the defendants in pursuance of a combination and conspiracy for that purpose. A simple conspiracy, however atrocious, unless it results in actual damage to the party, is not the subject of a civil action; but if the conspiracy be carried into execution and damage ensues, the damage is the ground of the action. Herron v. Nichols, 25 Cal. 556; Hutchins v. Hutchins, 7 Hill, 104; Kimball v. Harman, 34 Md. 407; Savile v. Roberts, 1 Ld. Raym. 378; Buffalo Lubricating Oil Co. v. Everest, 30 Hun, 586; Tappan v. Powers, 2 Hall, 277.

The essence of a conspiracy, so far as it justifies a civil action for damage, is a concert or combination to defraud, or to cause either injury to person or property which actually results in damage to

the person or property of the person injured or defrauded. Place v. Minster, 65 N. Y. 89; Page v. Parker, 43 N. H. 363; Wiggins v. Leonard, 9 Iowa, 194; Whitman v. Spencer, 2 R. I. 124; Walsham v. Stainton, 33 L. J. Ch. 68; Smith v. Nippert, 76 Wis. 86; Haldeman v. Martin, 10 Pa. St. 370; Laverty v. Vanarsdale, 65 Pa. St. 507.

It is no answer to say that he could have declined to pay, contested the same, and possibly have relieved himself on defense in an action for delinquent taxes, for the allegations of the counts clearly disclose that it was only long after the money had been paid, that he ascertained the fact that what he did pay was excessive in amount.

If it be conceded that the defendants were quasi judicial officers, and that when they committed the acts, they were acting within the scope of their duties, still they would be liable. It is a rule supported by many most respectable courts and authorities that one, acting from impure or corrupt motives, cannot shield himself behind the claim that he is a judicial officer, and therefore absolutely relieved from responsibility for any course of conduct. Morgan v. Dudley, 18 B. Mon. 693; Kendall v. Stokes, 3 How. 87; Burton v. Fulton, 49 Pa. St. 151; Baker v. State, 27 Ind. 485; Seaman v. Patten, 2 Caines, 312; Downer v. Lent, 6 Cal. 94; Wasson v. Mitchell, 18 Iowa, 153; Rail v. Potts, 8 Humph. 224; Cope v. Ramsey, 2 Heisk. 197; Walker v. Hallock, 32 Ind. 239; Gault v. Wallis, 53 Ga. 675; Howe v. Mason, 14 Iowa, 510; Londegan v. Hammer, 30 Iowa, 508.

A line of authorities of which Stewart v. Cooley, 23 Minn. 347, is an example, lays down the general doctrine that one clothed with judicial powers cannot be held liable in a civil suit at the instance of an individual, for erroneous action, no matter by what motive it is alleged said action was prompted. This doctrine had its inception in a disposition of the courts to maintain the dignity and sanctity of judges and judicial tribunals. To extend it to assessors is a misconstruction of its purpose, an enlargement of its scope, and the wresting of a legal principal to an end never contemplated by its originators. In Yates v. Lansing, 5 John. 283, Chief Justice Kent made a most careful examination of the earlier authori-

ties, and cites both cases and opinions of distinguished jurists in support of his position. In this leading case is collected all the law upon the subject which preceded it. The eminent judge does not even suggest an extension of the principle beyond courts, jurors and grand jurors.

In Randall v. Bingham, 7 Wall. 523, the Supreme Court of the United States confronted this vexed question. In the brief of the defendant in error in that case, were collected all the English cases upon the subject from the year 1354. See note, p. 534. That court does not undertake to extend the doctrine beyond courts and judges. Bradley v. Fisher, 13 Wall. 335.

In Wilson v. Mayor of New York, 1 Denio, 595, and Weaver v. Devendorf, 3 Denio, 117, the rule in New York seems to have been first broadened so as to embrace others than judges or courts, even an assessor, but they do not cite a single authority to sustain the position. In Rochester White Lead Co. v. City of Rochester, 3 N. Y. 463, the same loose statement is made as to the breadth of the rule, and not a single authority is cited by the court in support of its position.

Robert D. Russell, for respondents.

Judicial officers are not liable in civil actions brought against them personally, for damages resulting from acts performed by them in the exercise of their judgment or discretion, in the performance of duties imposed upon them by law. Stewart v. Cooley. 23 Minn. 347.

An assessor, in making assessments, acts as a judicial officer and the rule is applicable to him. Rochester White Lead Co. v. City of Rochester, 3 N. Y. 463; Wilson v. Mayor of New York, 1 Denio, 595; Weaver v. Devendorf, 3 Denio, 117; Barhyte v. Shepherd, 35 Minn. 238; Western Railroad Co. v. Nolan, 48 N. Y. 513; Hemingway v. Inhabitants of Machias, 33 Me. 445; Stickney v. Bangor, 30 Me. 404; Baker v. Allen, 21 Pick. 382; Durant v. Eaton, 98 Mass. 469; Cooley, Taxation, 549, 553.

GILFILLAN, C. J. The defendants were assessor and assistant assessor of the city of Minneapolis. In each of several counts as a v.53m.—5

cause of action the complaint alleges that the defendants, acting in such capacities, wrongfully, unlawfully, willfully, and maliciously conspired, confederated, and agreed together with intent to injure the plaintiff, and to assess, and did so assess, certain of his real estate at certain sums, which it alleges to have been excessive, inequitable, and overvaluation, and that thereby he was compelled to pay, and did pay, for taxes a certain sum in excess of what he ought justly and legally to have paid.

It is unquestionable, and has been from the earliest days of the common law, that a judicial officer cannot be called to account in a civil action for his determinations and acts in his judicial capacity; however erroneous or by whatever motives prompted. This rule and the reason for it are nowhere more clearly and emphatically stated than by Mr. Justice Cornell in Stewart v. Cooley, 23 Minn. The only question has been as to its application to officers whose duties are largely ministerial only, when they come to perform duties imposed on them in their nature judicial or quasi judicial, as is the case with an assessor under the tax laws. comes to determine the value of property he exercises a quasi judicial function; he must determine it upon his judgment. Cooley, in his work on Taxation, (page 786,) lays it down that the exemption from private actions extends to assessors. If the rule protects such officers at all, it protects them for the same reason and to the same extent as in the case of judges of courts. are but few decisions in which the question was directly involved. We are not referred to and do not find any holding that the exemption does not extend to such officers as assessors. The cases of Weaver v. Devendorf, 3 Denio, 117; Barhyte v. Shepherd, 35 N. Y. 238; Western Railroad Co. v. Nolan, 48 N. Y. 513; Baker v. Allen, 21 Pick. 382,—hold that it does extend to them, and other decisions extend the rule to other officers when performing duties requiring the exercise of judgment. See Harrington v. Commissioners of Roads, 2 McCord, 400; Freeman v. Cornwall, 10 John, 470; Sage v. Laurain, 19 Mich. 137; Van Steenbergh v. Bigelow, 3 Wend. 42; Burton v. Fulton, 49 Pa. St. 151; Harman v. Tappenden, 1 East, 555: Wall v. Trumbull, 16 Mich. 228.

The same reason which justifies the rule of exemption in the case

of judges of courts applies to assessors, when they are determining the value of property for the purposes of taxation. Protection is not extended to the judge for his own sake, but because the public interest requires full independence of action and decision on his part, uninfluenced by any fear or apprehension of consequences personal to himself, except in so far as he may be accountable to the state for the manner in which he shall discharge the duties intrusted to him. It is also for the public interest that assessors, in determining values for purposes of taxation, should possess the same independence. If they were liable to have the considerations upon which they make the valuations impeached at the suit of every dissatisfied property owner, it is doubtful if men fit to hold the office could be induced to take it.

Upon both reason and authority, therefore, we hold that the exemption includes assessors in making assessments to the same extent that it does judges in exercising their judicial functions.

The assessment being unimpeachable in this action, in contemplation of law the alleged agreement or combination to make an excessive assessment, even if in so agreeing defendants were acting outside their quasi judicial functions, did not result in any injury to appellant, and without injury the action cannot be maintained. If there were an overvaluation, the law affords another remedy.

Order affirmed.

VANDERBURGE, J., took no part in this decision. (Opinion published 54 N. W. Rep. 988.)

53 68 81 155

CHARLES D. ELFELT vs. STILLWATER STREET-RAILWAY Co.

Submitted on briefs April 10, 1893. Decided April 24, 1893.

Findings Sustained by the Evidence.

Evidence held to sustain a finding of fact.

Highway by User Under the Statute.

The operation of 1878 G. S. ch. 13, § 74, as amended by Laws 1879, ch. 51, declaring that when a road shall have been continuously used, kept in repair, and worked for six years it shall be a public highway, is not affected by the fact that proceedings previously commenced to lay it out as a highway are still pending.

Street Railway.

A street railway imposes no additional servitude upon a street.

Appeal by plaintiff, Charles D. Elfelt, from an order of the District Court of Washington County, F. M. Crosby, J., made February 19, 1892, denying his motion for a new trial.

Action against the defendant, the Stillwater Street-Railway Company, to recover possession of a strip of land in the City of Stillwater, sixty-six feet wide, and extending from the southerly line of Elfelt's Addition to Oak Park northwesterly across that addition. The plaintiff was in 1876 the owner of this addition to Oak Park, and on September 6th of that year the Board of County Commissioners of Washington County laid a highway over and along this strip of land. Elfelt appealed to the District Court, and his appeal was tried June 15, 1877, in that court before a jury, and a verdict rendered affirming the action of the Board, and assessing his damages at \$76. No judgment has been entered on this verdict. In the Spring of 1880, the highway was opened by the proper public officers, and has ever since been kept in repair and used by the pub-In 1889, the defendant under license constructed a lic as a street. line of electric street railway along the center of this street, and erected poles on each side one hundred feet apart, and connected each pair by cross wires, and suspended therefrom an electric wire along the center, and by means thereof propelled and operated its street cars over and along the track.

Findings were made and filed, and judgment ordered for the de-

fendant. The plaintiff moved for a new trial, and being denied appeals.

Moritz Heim, for appellant. James N. Castle, for respondent.

GILFLIAN, C. J. The court below, trying the case without a jury, found as a fact that ever since 1880 the road in question "has been used by the public as such, and kept in repair and worked as such by the public authorities," and the evidence fully sustains that finding. This was sufficient to constitute it a public highway, under 1878 G. S. ch. 13, § 74, as amended by Laws 1879, ch. 51.

But appellant claims that because, prior to the beginning of that period, the county commissioners began proceedings to lay out the highway, and such proceedings went no further than a verdict in 1877 on an appeal by this appellant to the district court, the proceedings are to be deemed still pending, and their pendency prevents the operation of that statute. The statute makes no such exception to its operation, and, indeed, we think one of the conditions the legislature had in view, in passing it, was that there were then, and in future would be, a great many instances in which proceedings to lay out highways were, or would be, defective or incomplete, but in which, notwithstanding such defective or incomplete state of the proceedings, the public would use, keep in repair, and work the road for the time specified. The pendency of the proceedings, if they are to be deemed as pending, had no such effect as claimed.

The documentary evidence objected to could have no possible bearing upon the finding above quoted, and so could not prejudice.

This court has always recognized the distinction between an ordinary commercial railway and a street railway, in respect to laying them upon a street. The former imposes an additional servitude on the street, while the latter, being only a mode of using the street for legitimate street purposes, does not.

Order affirmed.

VANDERBURGH, J., took no part in this decision. (Opinion published 55 N. W. Rep. 116.)



WILLIAM H. BURNS et al. vs. CARL J. CARLSON et al.

Argued April 11, 1898. Decided April 25, 1898.

Mechanic's Lien, How Waived.

The statutory right of a mechanic or material man to enforce a lien upon real property may be released and waived by an instrument in writing, supported by a money consideration therein expressed, the money being paid by third parties, who had acquired property rights in the premises, although a sum less than the amount due was actually paid.

The Right to File a Lien is not an Estate or Interest in Land.

Such right is not an estate or interest in land which cannot be surrendered or released except in the manner provided in 1878 G. S. ch. 41, § 10.

Appeal by plaintiffs, William H. Burns and Willis R. Shaw, from a judgment of the District Court of Ramsey County, William Louis Kelly, J., entered March 22, 1892.

This action was against Carl J. Carlson, George R. Fling and the Connecticut Mutual Life Insurance Company, defendants, to foreclose a lien for \$172.99, balance due for lumber sold Carlson in September, 1890, and used in constructing a house on lot twenty-five (25) in block one (1) of Bryant's Addition to St. Paul. Their total bill was \$622.99. On October 1, 1890, Carlson borrowed of the Insurance Company \$3,100, to be repaid in five years, with six per cent. interest, payable semiannually. He mortgaged the property as security, and the money was, by mutual agreement, left with James Schoonmaker to pay parties, who claimed liens, and the balance to Carlson. On October 17, 1890, Schoonmaker paid to Donat Authier, plaintiffs' agent, \$450, and in consideration thereof he gave a receipt for the money in the firm name of the plaintiffs, as follows:

"ST. PAUL, Oct. 17, 1890.

"Received of James Schoonmaker, four hundred and fifty dollars; in consideration of which sum we hereby release and waive all our lien and right of lien, on and against, lot twenty-five in block one of Bryant's Addition to St. Paul, and the buildings thereon, for material furnished in the erection of a certain dwelling house upon said lot.

Burns & Shaw, Per D. Auther."

On October 29, 1890, Carlson sold and conveyed the property to Fling, subject to the mortgage. The plaintiffs on December 6, 1890, filed a statement and claim for a lien for the balance of their bill and brought this action to foreclose it. The issues were tried January 27, 1892. The court found as one of its conclusions of law that the plaintiffs had waived their right, and were not entitled to a lien on the property. Judgment was so entered, and plaintiffs appeal.

Howard L. Smith, for appellants.

Williams & Schoonmaker, for respondents.

Collins, J. It is undisputed that on October 17, 1890, the plaintiffs, as material men, were entitled to a lien on the premises described in the complaint, in an amount exceeding \$600. title to the property was then in defendant Carlson, to whom plaintiffs had sold the material, but he had in the month of July contracted to sell and convey the same to defendant Fling. It was actually conveyed to the latter October 29, 1890; he assuming a mortgage on the same, executed and delivered by Carlson to the defendant insurance company. A part of the money raised and received by means of this mortgage had been placed in the hands of an attorney to be used in behalf of defendants Fling and mortgagee insurance company in paying off and discharging any lien claims against the property arising by reason of labor performed or materials furnished by plaintiffs and others when erecting a dwelling thereon. had informed the attorney that the total amount of plaintiffs' claim for materials was \$450, and the latter, according to the findings, had acquiesced in the statement. Thereupon, October 17th, the attorney paid to plaintiffs' authorized agent said sum of \$450, taking a receipt in which the plaintiffs' lien and right of lien upon the premises for all materials furnished by them was expressly released and waived, and the release and waiver were required by the attorney as a condition precedent to such payment.

1. The appellants' claim that the receipt or instrument whereby the lien was released and waived cannot have that effect, because the plaintiffs' lien or lien right was an interest in land, which could not be surrendered except in the manner provided in 1878 G. S. ch. 41, § 10, is singularly without merit. The assertion that the stat-

utory right of a mechanic or a material man to enforce a lien is not an estate or interest in the land on which the work of one or the materials of the other may have been performed or furnished need not be supported by argument or illustration. Like other lien rights, it may be lost or abandoned or discharged. The release and waiver now being considered was in writing; it was supported by a money consideration therein expressed,—the money being paid by third parties, who had acquired property rights in the premises; and no good reason exists why the plaintiffs should not abide by it, if their agent, Authier, was authorized to sign the same, or if they have ratified his action.

- 2. The trial court found that Authier had such authority, and from an examination of the evidence we do not hesitate in saying that the finding was warranted. It is evident, if the testimony of the attorney is to be relied on, that when he accepted the release and waiver, and paid the money, by his own check upon a bank, he had reason to believe, from statements made a day or two before by one of the plaintiffs, that the agent was empowered to release and waive the lien claim; and there were other circumstances, appearing in the evidence, tending to justify the conclusion of the trial court. Again, the agent promptly informed his principals that he had signed and delivered the release and waiver in order to obtain the money from the attorney, and no objection was made, or repudiation attempted.
- 3. Counsel insists that the court erred when permitting defendant Fling to testify that he had a contract for the purchase of the property, this contract being in writing. If this contract was of any importance, the objection urged by counsel may be disposed of by saying that the whole matter seems to have been dropped when counsel stated that he objected to oral testimony respecting the contract.

Judgment affirmed.

Vanderburgh, J., took no part. (Opinion published 54 N. W. Rep. 1055.)

GEORGE E. WILLIAMSON vs. HENRY E. SELDEN.

Submitted on briefs April 10, 1893. Decided April 25, 1893.

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Parties to Actions by Receivers.

The insolvent is not a necessary party defendant to an action instituted by an assignee or receiver under the provisions of Laws 1881, ch. 148, § 4, to annul and avoid a conveyance of real property alleged to have been a fraudulent and forbidden preference of a creditor.

Appeal by defendant, Henry E. Selden, from an order of the District Court of Hennepin County, *Charles M. Pond*, J., made October 6, 1892, overruling his demurrer to the complaint.

The plaintiff, George E. Williamson, was on June 7, 1891, appointed under Laws 1881, ch. 148, § 2, receiver of the property and estate of Philo L. Hatch, insolvent. On March 9, 1891, Hatch owned lots one (1), two (2) and three (3) in block fourteen (14) in Wells, Sampson & Bell's Addition to Minneapolis, alleged to be of the value of \$100,000, but incumbered \$40,000. On March 4, 1891, he and his wife, Eleanor W. Hatch, gave a power of attorney to their son Raymond W. Hatch, authorizing him to sell and convey the property. On the same day they removed from this State. March 9, 1891, the attorney, under this power conveyed the property to the Home Savings and Loan Association, for \$80,000, and it assumed and agreed to pay the mortgage as a part of the purchase In further part payment the said Association caused one Angeline N. Sprague and husband to convey by warranty deed to Luella H. Terry, the daughter of the insolvent, certain real estate in Minneapolis which it in fact owned, but the title to which was then in the name of Mrs. Sprague. The insolvent owed divers unsecured debts to different persons, aggregating over \$75,000. Among these unsecured creditors was the defendant Henry E. Sel-To him the insolvent owed \$8,000, which he was unable to den. On June 23, 1891, Luella H. Terry and husband, at the request of her father, the insolvent, conveyed to Selden the property so deeded to her by Mrs. Sprague, and he accepted it in payment of his claim against the insolvent. This was done with intent to give him a preference over other creditors. Subsequently on September 17, 1891, Selden and wife conveyed this property without consideration to the defendants James H. Bradish and Moses H. Powers, with the purpose and intent of preventing the receiver from recovering it, they at the time, knowing of such purpose and intent, and all the facts above stated. This action was brought by the receiver to obtain this property so conveyed to Selden, and by him to Bradish and Powers, or \$8,000, its value. The only parties made defendants in the action were Selden, Bradish and Powers. murrer was interposed by Selden for defect of parties defendant; he claiming that for the proper, full and final determination and adjudication of the matters in controversy Luella H. Terry, Philo L. Hatch and Eleanor W. Hatch, his wife, were proper and necessary This demurrer was overruled with parties defendant to the action. \$10 costs, and Selden allowed to answer in fifteen days. order he appeals.

Woods & Kingman, for appellant.

Plaintiff's theory of the action, and the only one on which it can be maintained, is, that the transfer to defendant Selden being absolutely void, the title to the premises is vested in Philo L. Hatch, and for the purpose of administration devolves upon the receiver. if the title ever vested in Philo L. Hatch, it became subject to the inchoate contingent interest of his wife, Eleanor W. Hatch, an interest which this court has held to be a valuable one, (In re Rausch, 35 Minn. 291,) and which has always been recognized and protected by the statutes of this State. (1878 G. S. ch. 74, § 29.) claimed that Mrs. Hatch has divested herself of this interest. original transfer to the Home Savings and Loan Association was made by deed, executed by Raymond W. Hatch as her attorney in fact, but to none of the subsequent deeds is she a party, and if she had been her interest would not have been barred by joining in an invalid deed. Rupe v. Hadley, 113 Ind. 416. Mrs. Hatch cannot be divested of her interest by insolvency proceedings against her husband, to which she has not consented in writing. Corser, 51 Minn. 406.

Whether or not, in an action of this character, the insolvent debtor is a necessary party defendant, is a question on which the authorities differ. The greater number of the cases in which the point is considered are actions in the nature of creditors' bills, brought by judgment creditors to subject lands claimed to have been fraudulently conveyed by the debtor, to the lien of their judgments. It has been held in a number of such cases that the judgment debtor is not a necessary party. But it is a noteworthy fact that, in nearly all of such cases, it has been held that he is a proper party. Potter v. Phillips, 44 Iowa, 357; Allison v. Weller, 6 Thomp. & C. 291; Verselius v. Verselius, 9 Blatchf. 189. In Leonard v. Green, 34 Minn. 137, this court says it is the usual and the better practice to join the judgment debtor in such cases.

In Pomeroy's Remedies, § 347, it is said that in an action by a judgment creditor to reach the equitable assets of the debtor, or to reach property which has been transferred to other persons, or property which is held by other parties, under such a state of facts that the equitable ownership is vested in the debtor, the judgment debtor is himself an indispensable party defendant. Miller v. Hall, 70 N. Y. 250; Hubbell v. Merchants' Nat. Bank, 42 Hun, 200; Lovejoy v. Irelan, 17 Md. 525; Black v. Bordelon, 38 La. An. 696; Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; Lawrence v. Bank of Republic, 35 N. Y. 320; Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Shaver v. Brainard, 29 Barb. 25; Gaylords v. Kelshaw, 1 Wall. 81; Walker v. Powers, 104 U. S. 245.

Flannery & Cooke, for respondent.

Luella H. Terry is not a necessary party. As against creditors of Philo L. Hatch, she never had any beneficial interest in the land. The consideration therefor was paid by Philo L. Hatch, insolvent, but even if she had, she divested herself of it by her conveyance to the defendant, Henry E. Selden.

Nor is Eleanor W. Hatch a necessary party. As against everybody but the creditors, the conveyance of the land in question by the Home Savings and Loan Association to Luella H. Terry vested the title thereto in her, notwithstanding the consideration for such conveyance was paid by Philo L. Hatch. 1878 G. S. ch. 43, § 7; Connelly v. Sheridan, 44 Minn. 18. And therefore, because Philo L. Hatch had no estate in that land, Eleanor W. Hatch, his wife, had no contingent or inchoate interest therein, and she is not inter-

ested in this action relative to the title thereto. The law requires the insolvent to give for the equal benefit of all his creditors all his property subject to levy and forced sale; and as his wife's inchoate, contingent interest in his real estate is not subject to levy and sale on execution, (Dayton v. Corser, 51 Minn. 406,) it does not pass to the receiver by operation of law, (Kinney v. Sharvey, 48 Minn. 93.) He has no interest therein, and she is not affected in any way by the present action. If she ever had an inchoate interest, it still remains hers, notwithstanding her husband's insolvency.

Philo L. Hatch, the insolvent debtor, is not a necessary party. The receiver stands upon the same footing as the assignee so far as setting aside conveyances, giving preference to a creditor upon a pre-existing debt is concerned. Bliss v. Doty, 36 Minn. 168; Beardslee v. Beaupre, 44 Minn. 1. He proceeds by virtue of his statutory powers, (Gallagher v. Rosenfield, 47 Minn. 507,) and to accomplish such purpose in the discharge of his duties, the insolvent debtor is not a necessary party in an action brought by the receiver to set aside a conveyance void under that law, (Donohue v. Ladd, 31 Minn. 244; Langdon v. Thompson, 25 Minn. 509; Buffington v. Harvey, 95 U. S. 99; Weise v. Wardle, L. R. 19 Eq. Cas. 171; Story's Eq. Pleading, § 519; 1 Daniell's Ch. Pr. 255.)

If the title were still in Luella H. Terry, and the action was prosecuted against her, Philo L. Hatch would not be a necessary party. Leonard v. Green, 30 Minn. 496; Campbell v. Jones, 25 Minn. 155.

Collins, J. This action was brought by the receiver of an insolvent to avoid and annul certain conveyances of real property, and to recover such property, as provided by Laws 1881, ch. 148, § 4. The appeal is from an order overruling a demurrer to the complaint interposed by the defendant, Selden, upon the ground that there is a defect of parties defendant. Selden is the creditor to whom the alleged fraudulent and forbidden preference is said to have been made by means of the conveyances before mentioned, and it is contended by his counsel that the insolvent, Philo L. Hatch, and his wife, Eleanor W. Hatch, who, from the complaint, appears to have taken some part in the transactions, are necessary parties, and should have been made defendants. We think not.

- 1. If Mrs. Hatch ever had or held an inchoate interest or right in the premises involved, said to have belonged to her husband, although he never held the legal title, she still retains that interest or right, so far as it now appears. She was not divested or deprived of it through the insolvency proceedings against Mr. Hatch. Dayton v. Corser, 51 Minn. 406, (53 N. W. Rep. 717.) Nor has she parted with or conveyed it in any manner. It is obvious that she will not be affected personally by the outcome of this action.
- 2. When this plaintiff became the receiver of the insolvent, under the provisions of chapter 148, supra, all property of such insolvent, and every part of the same, vested forthwith in him. The title to all, whether the insolvent held the legal title or possessed an equitable interest only, was wholly and altogether in the receiver for the purposes of the trust with which he was charged. The insolvent retained no interest to be affected by the proceedings in execution of the trust, except such as were represented by the receiver, and has no interest in the result of this action save that directly represented by this plaintiff as receiver. Langdon v. Thompson, 25 Minn. 509; Donohue v. Ladd, 31 Minn. 244, (17 N. W. Rep. 381;) Buffington v. Harvey, 95 U. S. 99; Bank v. Sherman, 101 U. S. 406. these reasons an insolvent is not a necessary party defendant to an action instituted by an assignee or receiver to annul and avoid a conveyance of real property alleged to have been a fraudulent and forbidden preference of a creditor. Buffington v. Harvey, supra; Weise v. Wardle, L. R. 19 Eq. 171. See, also, in this connection, Leonard v. Green, 34 Minn. 140, (24 N. W. Rep. 915.)

Order affirmed.

Vanderburgh, J., did not sit. (Opinion published 54 N. W. Rep. 1055.)

JOHN C. COLLINS vs. CURTIS G. LEWIS.

Submitted on briefs April 4, 1893. Decided April 25, 1898.

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Covenant for Quiet Enjoyment, Breach of.

The pleadings in this action, which was brought by a landlord to recover rent accruing upon a lease of real property, examined. Held that, from the averments in the answer, it appeared that there had been a breach of the covenant for quiet enjoyment found in the lease, and that it was error for the court below to order judgment on the pleadings in plaintiff's favor.

Appeal by defendant, Curtis G. Lewis, from a judgment of the District Court of Ramsey County, Charles E. Otis, J., entered against him January 31, 1893, for \$264.30 damages and costs.

The plaintiff, John C. Collins, owned lot thirteen (13) in block four (4) in St. Paul Proper, and on May 26, 1891, leased it to defendant for one year from June 1, then next, with the privilege of renewal for two years more. The plaintiff therein covenanted that defendant should quietly and peaceably hold, have and enjoy the premises during the term. Defendant covenanted to pay \$60 rent per month. The lease was renewed, and this action was to recover rent for the four months ending with October 31, 1892. The lot fronted south fifty feet on Sixth street, and was one hundred and fifty feet deep. There was a small office building on the southeast corner, and defendant repaired it, and built a fireproof vault in its rear, and expended over \$800 in making these improvements. He used the lot for a coal and wood yard.

On June 27, 1892, plaintiff made a contract with Robert Mannheimer, owner of the adjoining lot on the east, granting him the right to excavate to the depth of fourteen feet upon the east eight feet in width, of lot thirteen (13,) and to place on the line between their lots the footings and foundations for a party wall below the surface. Mannheimer agreed not to disturb or injure the office or vault of defendant, or interfere with his use of the surface of plaintiff's lot, and agreed to indemnify and save plaintiff harmless from all claims of the tenant for damages on account of any interference

with his property or rights. Under this contract Mannheimer excavated the earth and built the wall. Defendant by his answer claimed that he sustained damages to the amount of \$600. He asked judgment for this sum. The action was tried January 25, 1893. Before any evidence was offered, the Judge, on the motion of plaintiff, held that on the pleadings the defendant had no defense or counterclaim, and instructed the jury to return a verdict for the plaintiff for the amount he claimed. Defendant excepted, and appeals from the judgment entered on the verdict.

Warren H. Mead, for appellant.

The acts done by Mannheimer and set forth in the answer were done by the direction and at the instigation of the plaintiff, and they were his acts, and he is responsible for them to the defendant. Sherman v. Williams, 113 Mass. 481; Sanborn v. Sturtevant, 17 Minn. 200, (Gil. 174;) Wall v. Osborn, 12 Wend. 39; Coats v. Darby, 2 N. Y. 517; Robinson v. Vaughton, 8 C. & P. 252.

Plaintiff's acts amounted to an eviction from one-sixth of the premises. They amounted to a substantial and effectual deprivation of the beneficial enjoyment of the property. *Edgerton* v. *Page*, 20 N. Y. 281; *Lounsbery* v. *Snyder*, 31 N. Y. 514.

Where there has been an eviction from a part of the demised premises by the acts of the landlord, there can be no recovery on the lease for the rent. Royce v. Guggenheim, 106 Mass. 201; Christopher v. Austin, 11 N. Y. 216; Blair v. Claxton, 18 N. Y. 529; Dyett v. Pendleton, 8 Cow. 727; Lawrence v. French, 25 Wend. 443.

When the landlord interferes under claim of title, with demised premises, and prevents the tenant from having the use and enjoyment of the whole or part thereof, tenant, when sued for the rent subsequently falling due, may recover on a counterclaim for the damages sustained. Goebel v. Hough, 26 Minn. 252; Eldred v. Leahy, 31 Wis. 546; Mayor of New York v. Mabie, 13 N. Y. 151; Rogers v. Ostrom, 35 Barb. 523. Any act of lessor under claim of title or right, against the tenant's enjoyment of demised premises, is a violation of the covenant of quiet enjoyment. Avery v. Dougherty, 102 Ind. 443.

C. D. & Thos. D. O'Brien, for respondent.

The plaintiff exercised only his proprietary right to convey an interest in his property to Mannheimer subject to the rights of the defendant, as lessee. He created no paramount title, for he could not do that, nor were the acts which were done by Mannheimer done under a claim of paramount title. If plaintiff had done them himself, he might have been liable in an action of trespass, but where there is no eviction, and where the lessee remains in possession of the property, he must show a direct connection between the landlord and the trespasser to charge the former with the consequences of his acts. Taylor, Landlord and Tenant, (6th Ed.) §§ 310, 311, 233.

If the contract with Mannheimer is to be treated as a sale of part of the premises, it can have no greater effect than a sale of the entire premises. If the plaintiff had conveyed the property to a third party, he would not be responsible to defendant for subsequent trespasses or improprieties committed by his grantee. The agreement is an ordinary party-wall agreement, differing from the usual one only in respect to the fact that the portion of the party-wall above the surface was to be entirely on the grounds of Mannheimer.

The covenant for quiet enjoyment is fulfilled when the landlord is in a position to make a good lease, and can only be broken by either the direct and personal act of the landlord, or the existence of a paramount title. The interference with, or disturbance of, the tenant by a third party, whether he be the landlord's grantee of a part, or the whole of the property, is not a violation of this covenant. Gazzolo v. Chambers, 73 Ill. 75; Kelly v. Dutch Church of Schenectady, 2 Hill. 105.

Counsel for defendant says that it was intended that this contract with Mannheimer should be executed during the life of the lease. There is not a word in the contract as to when it shall be performed. There is no limitation of time, nor is there any obligation upon the part of Mannheimer to commence this construction within the life of this lease, or at any other time. It cannot be said that plaintiff contracted with reference to an invasion of the defendant's rights. The court below held upon the

pleadings that defendant's action, if against anybody, must be against Mannheimer, and that plaintiff was in nowise connected therewith.

COLLINS, J. On the trial of this action, judgment upon the pleadings was ordered in plaintiff's favor, and defendant appeals from the judgment thereafter entered. It appears from these pleadings that plaintiff leased to defendant a city lot, with the buildings situate thereon, for the period of one year, commencing June 1, 1891, the latter taking immediate possession, and using one of the buildings as an office. The lease was in writing, containing the usual covenants, including that of quiet enjoyment. It also provided for a renewal for the period of two years, and at the expiration of the first year was probably renewed. This action was brought to recover the stipulated rent for the months of July, August, September, and October, 1892. By the answer defendant admitted the alleged failure and refusal to payrent for the four months mentioned, and as a defense, by way of counterclaim, averred that about July 1st plaintiff, claiming title and ownership to the same. entered upon and took possession, with divers other persons, of the easterly eight (8) feet of the leased lot, and excavated the soil thereof to the depth of fifteen (15) feet, against defendant's protest, and thus, to the depth and width above indicated, removing the soil and excavating under the said office building, and under an addition thereto, and a fireproof vault built and erected on the premises by defendant, and also under the sidewalk in front of the entrance to said office building, whereby he had been damaged and injured in a manner and to an amount which need not here be detailed. It was further averred by defendant, as one of the unauthorized acts of plaintiff, that on June 27, 1892, he had made and entered into a certain written agreement with one Mannheimer, a copy thereof being incorporated into the answer, and that the other acts complained of were performed, plaintiff authorizing and directing the same, under the agreement, but by Mannheimer and his agents. This agreement recites that said Mannheimer, as the owner of the lot upon the east of the leased premises, was about to erect a large and substantial building on his lot, and, upon the conditions specified, it was to the advantage of both parties that a portion v.53 M.-6

of the foundation for the westerly wall of the proposed building be placed upon the plaintiff's lot. It was therefore agreed between said plaintiff and said Mannheimer that the latter should have the right, and he was authorized and empowered, to excavate upon the easterly line of plaintiff's lot to the width of eight feet, and to the depth of fourteen feet, and to place in and upon such excavation the footings and foundation of the westerly wall of the building he was about to erect, and to keep and maintain the same forever. All of the wall proper—that is, all above the street level—was to be erected upon Mannheimer's lot, and it was to become a party wall, under certain conditions. It was also agreed that in making the excavation, and in putting in the foundation for his building, Mannheimer should not injure or interfere with any building or structure then on plaintiff's lot, nor with the use of the surface of the lot by the tenant then in possession,—the present defendant. It was also expressly stipulated that Mannheimer should provide secure and substantial support for all buildings then on plaintiff's lot, including the one owned by the defendant, so that they should not be injured or damaged by the excavation, or by the erection of the new structure, and, further, that, in case of injury or damage to any of said buildings by reason thereof, such injury or damage should be paid for and sustained by Mannheimer; this plaintiff being indemnified and saved harmless therefrom. Other conditions and stipulations in the agreement need not be mentioned.

Counsel for respondent do not contend, as we understand, that the allegations found in the answer fail to show that defendant's rights as a tenant in possession have been invaded by the parties who entered upon the premises and made the excavation, but their position seems to be that from all of these averments, and the agreement made a part of the answer, it clearly appears that the invasion and trespass was that of Mannheimer and his agents, for which the plaintiff was no more responsible than he would have been had he conveyed the leased property in fee to the former, and the excavation had then been made. They insist that it was not the purpose nor the effect of the agreement to authorize the commission of any unlawful act by Mannheimer, because in it the tenant's right of possession was expressly recognized, and it was agreed that Mannheimer should not interfere with defendant's use of the surface

of the lot, nor should he injure or interfere with any of the buildings upon the same.

By the execution and delivery of the agreement, Mannheimer was authorized and empowered by the owner of the fee to enter upon and remove a portion of a lot which the latter had previously leased to the defendant for a term of years, and of which defendant, as tenant, held peaceable possession. A part of the lot so to be excavated lay underneath the building owned by the landlord, and a portion under the building owned by the tenant; his ownership thereof being mentioned and acknowledged in the agreement with Mannheimer. According to the answer the removal of the soil from about one-sixth of the surface of the premises seriously damaged each of these buildings, rendering them unsafe and insecure, and resulted in other damage to the tenant. This result the landlord had so far anticipated as to undertake to protect himself by providing in the agreement for his own indemnity from pecuniary loss should his tenant be injured. It is difficult to understand how the landlord could authorize the performance of the acts provided for in the agreement without fully realizing that a trespass was to be committed, and the right to quietly enjoy the premises invaded, unless his tenant's consent to the excavation was first obtained. fact this invasion was expressly sanctioned, aided, and abetted by the agreement, and without its execution it is safe to say would not have occurred. Taking the agreement in connection with the positive assertion found in the answer, that the acts of Mannheimer and his agents were committed under plaintiff's direction, it is obvious that under a claim of title the landlord has interfered with the tenant's possession of demised premises, and has prevented him from having the use and enjoyment of a part thereof. amounted to a breach of the covenant for quiet enjoyment, and when such a condition exists, and an action is brought to recover for rent subsequently falling due, the tenant may counterclaim and recover his damages. Goebel v. Hough, 26 Minn. 252, (2 N. W. Rep. 847.)

It has been urged by counsel for respondent that, because the tenancy was acknowledged in the writing, no recovery as for damages can be allowed. The landlord cannot be permitted to excuse and avoid the consequences, the almost inevitable result of his own

acts, by showing that the party with whom he has contracted, and has authorized to perform the acts complained of, has agreed to perform so that no injury could result. It has also been argued that no invasion of the defendant's rights was contemplated, because there was no intimation or requirement in the agreement that the excavation should be made during the life of the lease, and there was no obligation on Mannheimer to remove the earth at any time. In answer to this, if answer be required, we need but to say that Mannheimer was not prohibited from commencing at once, and that action during the life of defendant's lease was contemplated is conclusively shown from the provisions in the agreement designed to protect the landlord, plaintiff, and save him harmless from such loss and damages as defendant might sustain as a tenant. A new trial must be had.

Judgment reversed.

Vanderburgh, J., took no part. (Opinion published 54 N. W. Rep. 1056.)

KNUTE A. RAUNN vs. JOHN LEACH.

Submitted on briefs April 4, 1893. Decided April 25, 1893.

Service of Summons by Publication.

The provisions of 1878 G. S. ch. 66, § 65, regulating the service of summons by publication in certain actions brought against nonresidents, were complied with by publishing such a summons in a daily newspaper on Tuesdays, February 7th and 14th, on Thursdays, February 23d, March 2d and 9th, and finally on Wednesday, March 15th. Each of the six consecutive weeks commenced upon Tuesday, and it was not necessary that the publications should be made at regular intervals of seven days.

Appeal by plaintiff, Knute A. Raunn, from an order of the District Court of St. Louis County, Calvin L. Brown, J., made February 25, 1893, overruling his demurrer to the answer.

The plaintiff alleged that he owned the northwest quarter of section two (2) T. 154, R. 45, in Polk county, worth \$500. That the defendant John Leach owned it January 15, 1880, and on that day mortgaged it to plaintiff to secure the payment of \$200 and inter-

est, one year thereafter. That the defendant failed to pay and plaintiff foreclosed the mortgage by action in the District Court, and defendant was served by publication of the summons. He did not appear in the action, and judgment of foreclosure was entered on proof of his default, and the land sold by the sheriff, and bid in by plaintiff, and was not redeemed from the sale.

The defendant answered that when the foreclosure action was instituted he was not a resident of this State, that the only service of the summons was by publication in the "Crookston Brodax," a newspaper published daily in Polk county. That the summons was published only in papers issued February 7, 14, 23, and March 2, 9 and 15, 1882, and that defendant had no other notice of the pendency of the foreclosure action; that the court acquired no jurisdiction of that action, and the sale was void.

To this answer plaintiff demurred on the ground that it did not state facts sufficient to constitute a cause of action. The District Court overruled this demurrer, and plaintiff appeals.

C. M. Simpson, for appellant.

In the case of Godfrey v. Valentine, 39 Minn. 336, this court followed Ullman v. Lion, 8 Minn. 381, (Gil. 338,) and Golcher v. Brisbin, 20 Minn. 453, (Gil. 407,) and held that if the proof fails to show a publication once in each week, the service is insufficient and the proceeding void. All the law requires is, that the publication be made once in each week, for six consecutive weeks. 1878 G. S. ch. 66, § 65. A week is a period of seven days, beginning with Sunday and ending Saturday. It is also a period of seven successive days. Ronkendorff v. Taylor's Lessee, 4 Pet. 349.

White, Reynolds & Schmidt, for respondent.

1878 G. S. ch. 66, § 65, is substantially the same as the statute with reference to the publication of notices in the Probate Courts. They are grouped together in *Greenwood* v. *Murray*, 28 Minn. 120. In *Dayton* v. *Mintzer*, 22 Minn. 393, this court held that publications on regular publication days, at the rate of one a week, if separated by intervals of a week, are sufficient. In *Godfrey* v. *Valentine*, 39 Minn. 336, this court cited *Hcrnandez* v. *His Creditors*, 57 Cal. 333, with approval. That case holds that publications must occur with

an interval of not more than one week between them. This very question was, however, passed upon and decided by Judge Blatchford when on the Circuit bench, in the matter of David J. King et al., bankrupts, 5 Ben. 453, and the conclusion reached by him is the same as that for which the defendant contends.

Collins, J. In this action, brought to determine an adverse claim made to certain real estate, the complaint and answer disclosed that plaintiff's alleged title in fee depended wholly upon the regularity of the proceedings in an action brought in 1882 to foreclose a mortgage upon the property, executed and delivered to him by the defendant, said action having been brought while the latter was a nonresident of the state, and service of the summons having been made, if at all, by publication. By demurrer to the answer the regularity and sufficiency of these foreclosure proceedings have been assailed at but one point. It stands admitted that the summons was published in a daily newspaper six times, as follows: On Tuesday, February 7th, and on the following Tuesday, February 14th; next on February 23d, and then on March 2d and 9th, each being on Thursday; and finally on Wednesday, March 15th. seen that the third publication was made nine days after the second, while the sixth came six days subsequent to the fifth. sel for respondent take the position that, as the first publication was upon Tuesday, each succeeding one should have been on the same day of the week,-that is, the summons should have been published at regular intervals of seven days,—and this was the view, undoubtedly, of the learned judge below when sustaining the demurrer.

The statute which must now be construed, 1878 G. S. ch. 66, § 65, provides that the summons shall be published "once in each week for six consecutive weeks," and the sole inquiry now is as to the absolute necessity of so publishing on the same day of each of these six consecutive weeks. The counsel for respondent, in addition to Hernandez v. Creditors, 57 Cal. 333, and In re King, 5 Ben. 453, cite Dayton v. Mintzer, 22 Minn. 393, and Greenwood v. Murray, 28 Minn. 120, (9 N. W. Rep. 629,) in support of the order appealed from. In the opinion in Dayton v. Mintzer and in the syllabus to Greenwood v. Murray may be found sugges-

tions that the statutory requirements providing for the publication of certain legal notices could only be complied with by separating the several weekly publications by intervals of exactly seven days. In neither of these cases was there a suggestion of this character, and the suggestions in reference to it were purely obiter. lows that the question must be treated as an open one in this jurisdiction. A week is defined by all lexicographers as a period of time commencing with Sunday and ending with Saturday night, and also as a period of seven days' duration, without reference to the time such period commences. Therefore it need not commence, necessarily, on the morning of the first day of what has been denominated as the biblical week, but on a later day. In the case at bar the summons was published for the first and second times on the third day of the biblical week, and thereafter it appeared upon either the fourth or fifth days of such week, a Sunday intervening between each publication. It was also published once in each of the six consecutive weeks commencing on the day of its first appearance in the paper, Tuesday, February 7th. We are unable to hold that the statute was not complied with. The summons appeared once in each of the six periods of seven days' duration beginning upon and which followed consecutively the date just men-We construe the statute as authorizing just such a publitioned. cation. The statutory week must commence upon the day of the first publication, and there is nothing in the language used which would justify the conclusion that because the publication must be "once in each week" the day of the first publication must determine the day on which each subsequent publication is to be made, and that exactly seven days must intervene between each. The following cases warrant our conclusion, and some of them go much further than would be necessary to uphold the validity of the service in question: Ronkendorff v. Taylor, 4 Pet. 349; Steinle v. Bell, 12 Abb. Pr. (N. S.) 176; Wood v. Knapp, 100 N. Y. 109, (2 N. E. Rep. 632;) Bachelor v. Bachelor, 1 Mass. 256; State v. Yellow Jacket Silver Mining Co., 5 Nev. 415.

Order reversed.

Vanderburgh, J., absent, took no part herein.

(Opinion published 54 N. W. Rep. 1058.)

Application for reargument denied May 16, 1893.

THOMAS L. CLARK VS. SETH ABBOTT.

Argued April 7, 1898. Decided April 25, 1898.

Payment in Part, in Satisfaction of the Entire Debt.

Where one not the debtor, nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay, a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness.

Appeal by plaintiff, Thomas L. Clark, from an order of the District Court of Hennepin County, William Lochren, J., made December 30, 1892, granting defendant's motion for a new trial.

The defendant, Seth Abbott, on September 20, 1883, sold and conveyed to plaintiff with warranty lots seventeen (17) and eighteen (18) in block four (4) in his Addition to Minneapolis, for \$500, and also covenanted that they were free from incumbrance. There was in fact a mortgage on them to Dennis L. Peck for a large amount. It was afterwards foreclosed, and the lots sold in November, 1884, and never redeemed. (See Abbott v. Peck, 35 Minn. 499.) When plaintiff discovered the incumbrance, Abbott assigned to him as collateral security to his covenants, a mortgage for \$450, made by Clara L. Short, but plaintiff realized nothing from it. On November 14, 1887, Eugene I. Wetherell, defendant's son-in-law, offered plaintiff \$50 for the Short mortgage, and in full satisfaction of all his claims against defendant. This offer was accepted, Wetherell paid the \$50, and plaintiff assigned to him the Short mortgage, and gave a receipt as follows:

"MINNEAPOLIS, Nov. 14, 1887.

"Received of Seth Abbott fifty (50) dollars in full to date.

"Thomas L. Clark."

This action was brought January 6, 1892, to recover the purchase money that plaintiff paid for the lots, with interest, less \$50 received from Wetherell. On the trial, and after all the evidence had been submitted, defendant requested the Judge to instruct the jury that the receipt was presumptively conclusive upon the parties, and he

who would attack it, can do it only by showing fraud or mistake. As no fraud or mistake is alleged or proved, defendant is entitled to a verdict. The Judge refused, and he excepted. The jury returned a verdict for plaintiff for \$654.75.

The defendant afterwards moved the court for a new trial on the ground of errors of law occurring at the trial and excepted to by him, and on the ground that the verdict and decision were not justified by the evidence. The court granted the motion for the reason that the refusal to instruct the jury as requested by defendant was erroneous, saying:

"The receipt in evidence was given upon a payment by a third person for the defendant. The writing expresses it to be a payment by the defendant, and in full to date. The receipt was read and signed by the plaintiff, and no fraud or mistake is pretended. I think it must be held to be a contract of release and satisfaction of plaintiff's claims now sued upon, and which existed when this payment was made, and receipt given respecting them."

Roberts & Baxter, for appellant.

Plaintiff contends that the writing in evidence is a mere receipt, that it is not a contract and has in it no element of a contract, that it is merely a statement of fact, and as such can be contradicted oy parol. Morris v. St. Paul & C. Ry. Co., 21 Minn. 91; Elsbarg v. Myrman, 41 Minn. 541; Ryan v. Ward, 48 N. Y. 204; Pauley v. Weisart, 59 Ind. 241; Buckingham v. Oliver, 3 E. D. Smith, 129; Betdorf v. Albert, 59 Pa. St. 59; Packer v. Packer, 24 Iowa, 21.

The only cases in which a receipt has been held to be conclusive upon the party giving it, are cases in which the account was in dispute between the parties and a compromise was agreed upon; or cases in which a receipt was given for unliquidated damages. Cummings v. Baars, 36 Minn. 350; Bunge v. Koop, 48 N. Y. 225.

A. D. Smith, for respondent.

The receipt was in the nature of a contract, was executed by plaintiff in full possession of his faculties, he well knowing the signification of its language, and without any circumstances of haste, fraud, accident or surprise. He must be bound by it. Truax v. Miller, 48 Minn. 62; 19 Am. & Eng. Enc. Law, 1122.

Collins, J. It is well settled that where the amount of a debt is undisputed the receipt of a less sum from the debtor than the whole, upon an agreement to discharge the entire indebtedness, is not a satisfaction, and that such an agreement is nonenforceable. There is no consideration, it is said, for the relinquishment of a part of the debt, and hence an agreement so to do is nudum pactum. But the principles which can be applied in such cases have no application in the case now before us. The respondent, Abbott, owed the debt in question. Wetherell was under no moral or legal obligation to pay any portion of it, but he offered to pay to the creditor, this appellant, the sum of \$50 in full of all claims against Abbott. The offer was accepted, the money paid, and a receipt given "in full to date." Here was the act of a third person, who owed no duty in the premises, and the consideration essential to sustain the agreement was thus furnished. The technical reason for the application of the first rule mentioned, namely, an absence of consideration, no longer exists. When one not the debtor, nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay, a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his See Sounceberg v. Riedel, 16 Minn. 83, (Gil. 72;) indebtedness. Mason v. Campbell, 27 Minn. 54, (6 N. W. Rep. 405;) Schmidt v. Ludwig, 26 Minn. 87, (1 N. W. Rep. 803;) Laboyteaux v. Swigart, 103 Ind. 596, (3 N. E. Rep. 373;) Varney v. Conery, 77 Me. 527, (1 Atl. Rep. 683;) New-York State Bank v. Fletcher, 5 Wend. 85; Brooks v. White, 2 Met. 283; Welby v. Drake, 1 Car. & P. 557; Henderson v. Stobart, 5 Exch. 99.

Order affirmed.

VANDERBURGH, J., absent, did not participate. (Opinion published 55 N. W. Rep. 549.)

S. E. Olson vs. Henry W. Sharpless, et al.

Submitted on briefs April 10, 1893. Decided April 27, 1898.

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Order, Telegram and Letters Construed and Held to be a Contract.

*Held, that certain writings, when taken together, constituted a sufficient memorandum of a contract for the sale of goods under the statute of frauds.

Evidence upon the Measure of Damages.

Also, that the admission of certain evidence was not, under the particular facts of the case, in conflict with the rule that, on the seller's failure to deliver the goods, the measure of damages is the difference between the contract price and the price at the time when, and the place where, the goods should have been delivered.

Appeal by defendants, Henry W. Sharpless and Townsend Sharpless, from a judgment of the District Court of Hennepin County, *Thomas Canty*, J., entered November 15, 1892, for \$137.26.

In 1890, the plaintiff, S. E. Olson, was a retail merchant doing business in Minneapolis under the name of S. E. Olson & Co. fendants were wholesale merchants doing business at Philadelphia, Pa., under the name of Sharpless Bros. Their traveling salesman L. F. Rockwell called upon plaintiff November 19, 1890, and obtained from him an oral order for one hundred and one pieces of cashmere, ordinary colors, and nineteen pieces, high colors, averaging forty-eight yards per piece, to be sent plaintiff by rail as freight between January 15, and February 1, 1891. The bill was to be dated April 1, 1891. Price was to be forty cents per yard "regular" on the entire bill. This oral agreement Rockwell entered on a blank he carried, and on the same day mailed it to defendants, with a letter dated at Stillwater, stating that plaintiff would like to have them telegraph him their acceptance of the order. vember 27, 1890, they sent plaintiff a telegram that forty cents "net" was the best they could accept for nineteen pieces high colors, and Plaintiff wrote them that day stating that their asking a reply. telegram was received, and that he accepted their terms of one hundred and one pieces at forty cents "regular," and nineteen pieces at forty cents "net." On November 29, defendants wrote to plaintiff stating they had wired plaintiff on the 27th regarding the order Rockwell took on colored cashmeres; that the best price they could accept was forty cents "regular" for ordinary colors, and forty cents "net" for high colors. On January 1, 1891, the price of the goods advanced, and defendants refused to deliver. Plaintiff bought the goods in New York, paying \$99.82 more than he was to pay defendants. He brought this action to recover the excess in market value, over the contract price. A jury was waived. Evidence was given as to the meaning in the trade of the words "net" and "regular," and plaintiff had judgment for this excess, with interest and costs.

Evans, Keith, Thompson & Fairchild, for appellants.

There is no conflict of testimony in this case. The contract, if any was made, is in writing, and the court has only to construe the written instruments to determine the case. Defendants contend that the evidence shows that no agreement was ever arrived at between the parties. All the essential elements of the contract. if agreed upon by the parties, must appear in the memorandum. It must contain the names of both buyer and seller. Clampet v. Bells, 39 Minn. 272; Benjamin, Sales, § 234. And where the price is agreed upon, it must be stated in writing. Hanson v. Marsh, 40 Minn. 1: Benjamin, Sales, § 249. The order was a mere offer of plaintiff, and not a contract, until accepted by defendants. were at liberty to accept or reject it as they might see fit. Bounton Furnace Co. v. Clark, 42 Minn. 335; Banks v. Charles P. Harris Mfg. Co., 20 Fed. Rep. 667; Frank v. Eltringham, 65 Miss. 281; National Ref. Co. v. Miller, 3 N. Dak. —. The telegram and letter of November 27, and the letter of November 29, constitute the correspondence. It all has reference to the question of price only. is practically conceded that no contract was made prior to this correspondence. A contract cannot be predicated upon defendants' telegram of November 27, and plaintiff's alleged reply to it, as the telegram refers only to nineteen pieces of high colored goods, while the alleged reply accepts the price upon these, and upon one hundred and one pieces besides, which are not referred to in the telegram.

Defendants' position in this case is, that no contract was made or could be made, until plaintiff's order was passed upon by their credit department. This is reasonable in view of the universal custom of wholesale houses to maintain such credit departments, to which are referred all orders for the purchase of goods on credit.

If a contract of sale was made, plaintiff can recover only nominal damages, as he failed to bring himself within the rule for proving damages for the breach of such a contract. The measure of damages is the difference between the contract price and the price of the goods at the time when, and at the place where, they should have been delivered. The place for delivery under this contract was at Philadelphia, the place where the sellers did business. Janney v. Sleeper, 30 Minn. 473. The time of delivery was January 15, 1891. There is no evidence whatever tending to show the market price of the goods in question at Philadelphia on January 15, or that the market price was anything in excess of the contract price. What respondent paid for similar goods in New York is wholly immaterial.

J. F. McGee, for respondent.

Plaintiff's letter of November 27, 1890, accepting the offer contained in defendant's telegram of the same date, was effective as an acceptance, from the time the letter was deposited in the post-office. Chitty, Contracts, 17; Bishop, Contracts, § 328, note; Benjamin, Sales, § 69; Kessler v. Smith, 42 Minn. 494.

The order of November 19 states the date and parties to the transaction; the shipping directions, quantity, price, and term of credit given. The telegram of November 27, and the letter of November 29, state the price, the terms of sale, that is, ordinary colors, "regular," and high colors "net," and that defendants will accept plaintiff's order at the prices and on the terms stated, and to each exhibit is appended the signature of defendants. The terms "regular" and "net" are technical terms, in general use among wholesale houses, and have a well-understood meaning, which has been explained by persons familiar with the same.

MITCHELL, J. Defendants' assignments of error are all directed to two general propositions: First, that no contract or agreement was ever arrived at between the parties; and. second, that the trial court adopted an erroneous measure of damages.

In support of the first proposition it is urged (1) that the defendants never accepted plaintiff's order for the goods, and hence that no contract was agreed to, even orally, and, (2) even if there was, there was no written memorandum of it sufficient to satisfy the statute of frauds. The memorandum need not be a single paper. Several papers may be taken together to make up the memorandum, providing they refer to one another, or are so connected together, by reference or by internal evidence, that parol testimony is not necessary to establish their connection with the contract. The order, with the letter of defendants' agent accompanying the same, and defendants' telegram and letter to plaintiff, together with plaintiff's letter of acceptance, which had been lost, but of whose contents secondary evidence was introduced, fully justified a finding that the minds of the parties had met and agreed on the terms of the contract, and also satisfied the requirement of the statute of frauds. With the meaning of the technical trade terms "net" and "regular" explained, the writings, when taken together, contained all the essential elements of the contract,—the names of the buyer and seller, the description of the property, the price, the date of delivery or shipment, etc.

The suggestion that the telegram and letter of defendants to plaintiff were intended merely to adjust the *price*, and left them still free to reject the order on any other ground, seems to us more ingenious than ingenuous.

Undoubtedly, when the order was forwarded to defendants, they were at liberty to accept or reject it, as they saw fit, or to demand from plaintiff a property statement before deciding whether to accept or reject it. But that right was ended when the offer was accepted. They could not thereafter attach any new condition to the performance of their contract.

The fair import of their communications to plaintiff (and what, as we think, any business man would have understood from them) was an offer to sell the goods according to the terms of the order, subject only to a modification of the price of the 19 pieces specified; and when plaintiff replied, accepting the offer, the contract was closed. There is nothing in the point that plaintiff did not seasonably notify defendants of his acceptance of the offer. The testimony is that he mailed his acceptance on the same day he received the

telegram, (November 27th,) which in due course of mail presumably, reached defendants on or before December 1st.

2. The place of delivery being Philadelphia, where the sellers did business, the defendants' counsel correctly state the measure of damages as being the difference between the contract price and the market price in that city at the time when the goods should have been delivered, (which was January 15th;) and they assign as error the admission of evidence as to the price of the same goods in the city of New York, where plaintiff bought them, between January 15th and 20th. It appears in evidence that all goods of this brand are manufactured by one mill; that they "have a fixed [by which we understand is meant uniform] price in the trade;" that a single agent of the manufacturers, whose office is in New York, has control of the entire output of the mill, and fixes the price of the goods for the trade: that plaintiff applied to this agent, and obtained his prices and terms, and then went to H. B. Classin & Co., and, finding their terms a little more favorable as to time of payment, purchased of them at prices as favorable as he could obtain anywhere. It also appears that the prices which he paid were less than 5 per cent. in excess of those at which defendants had contracted for with him. It also appears that defendants wrote to plaintiff in November that the price in Philadelphia had been already advanced one cent a yard, and again, in December, that they had written to all jobbers that on January 1st the goods would be advanced 5 per cent. It seems to us that the effect and fair import of this evidence was to show that plaintiff had duplicated the order in New York on at least as favorable terms as could have been obtained in Philadelphia; and, if so, certainly defendants have no ground of complaint.

Judgment affirmed.

Vanderburgh, J., absent, took no part. (Opinion published 55 N. W. Rep. 125.)



Anthony Suchaneck vs. Eugene C. Smith.

Submitted on briefs April 4, 1898. Decided April 27, 1898.

Minneapolis Municipal Court, Powers of.

The municipal court of Minneapolis held to have jurisdiction to set aside a sheriff's return of the execution by him of a writ of restitution, issued to enforce a judgment of that court in proceedings for the recovery of demised premises, under 1878 G. S. ch. 84, such return being shown to be untrue. The court had authority also to enforce its judgment by issuing an alias writ of restitution.

Appeal by defendant, Eugene C. Smith, from an order of the Municipal Court of the City of Minneapolis, Charles B. Elliott, J., made August 25, 1892.

The plaintiff, Anthony Suchaneck, made complaint in writing before the Municipal Court of Minneapolis that on May 1, 1886, he owned lot six (6) in block six (6) in George Galpin's Addition to Minneapolis, and leased the rear forty-four (44) feet in length thereof to defendant for five years from that day, for \$50 a year rent for the first two years, and \$60 a year for the remaining three years payable quarterly in advance; the tenant to construct a building thereon and pay all taxes on the property demised. That defendant failed to pay rent and taxes past due, and on June 25, 1889, plaintiff served notice on him to vacate and surrender the premises on or before November 1, 1889. Plaintiff prayed judgment for restitution, and for costs and disbursements. The plaintiff, on December 5, 1889, obtained judgment as prayed, and on appeal to this court that judgment was affirmed. Suchaneck v. Smith, 45 Minn. 26. The mandate was sent down, and a writ of restitution was issued May 25, 1891, and delivered to the sheriff of Hennepin county for He returned thereon that he had executed the writ on service. June 17, 1891, and ejected the defendant from the premises, and put plaintiff in possession, and had collected \$14.68 costs.

On the next day defendant was found in possession, and he so remained. On July 21, 1892, the plaintiff filed his motion supported by affidavits, and obtained an order upon defendant to show cause August 4, 1892, why the return of the sheriff upon the writ of restitution should not be set aside as false and contrary to the fact, and

why an alias writ should not issue. Defendant appeared, and after hearing the parties the Municipal Court, on August 25, 1892, granted the motion, and directed the return to be canceled, and that an alias writ issue. From that order this appeal is taken.

Albee Smith, for appellant.

E. Bloom and Hart & Brewer, for respondent.

Dickinson, J. This respondent, the owner of certain real property which he had demised to the appellant for a term of years, instituted proceedings in the Municipal Court of the city of Minneapolis, pursuant to 1878 G. S. ch. 84, § 11, to recover possession of the premises, for default of the tenant in the payment of rent, and in the performance of other stipulations in the lease. Judgment was rendered for this respondent, and a writ of restitution issued, which was returned to the court by the sheriff as having been executed by him, by ejecting the tenant and putting the landlord in possession. Subsequently on motion made by the respondent, and supported by affidavit alleging the falsity of such return, and after hearing upon notice to the adverse party, that court by its order set aside the return with the writ upon which it was made, and granted an alias writ of restitution upon the judgment. This is an appeal from that order.

The only question of any importance presented on this appeal is whether the Municipal Court had power to thus vacate the return, and to issue the alias writ.

By the law creating this court it is declared to be a court of record, and to have all the powers usually possessed by courts of record at common law, subject to statutory modifications, and with some limitations not necessary to be referred to. Except as otherwise provided, it is in terms vested with all the powers which are possessed by the District Courts of the state, and all laws of a general nature are made generally applicable to that court. It is declared to have full power and authority to issue all process, civil and criminal, necessary or proper to carry into effect the jurisdiction given to it by law, and its judgments and other determinations. Sp. Laws 1874, ch. 141.

It is not denied that the court had jurisdiction in the proceeding for unlawful detainer, and the validity of its judgment therein is v.53m.—7

not called in question. In view of the extent of the power expressly conferred upon the court as above indicated, it is considered that its action here in question was within its jurisdiction. The court had the general power of courts of record to correct its record of the proceedings, erroneous or wrongful, of its own officers, and to carry into effect its judgment for restitution. 1 Black, Judgm. § 161; Balch v. Shaw, 7 Cush. 282; Fay v. Wenzell, 8 Cush. 315; and see Berthold v. Fox, 21 Minn. 51, 55; D. M. Osborne & Co. v. Wilson, 37 Minn. 8, 9, (32 N. W. Rep. 786;) State v. Macdonald, 24 Minn. 48. The judgment being shown not to have been in fact executed, and it appearing that the record of its execution—the sheriff's return—was false, the court had power, by amendment or by setting aside the false return, to conform the record to the fact. The judgment remaining unsatisfied, it was proper to issue an alias writ of restitution to carry it into effect.

Order affirmed.

VANDERBURGH, J., did not take part in this decision. (Opinion published 54 N. W. Rep. 982.)

JOHN DOBSON et al. vs. MORRIS L. HALLOWELL et al.

Argued April 18, 1898. Decided April 27, 1898.

Sham Answer Stricken Out, Although Verified.

A verified answer *held* properly stricken out as sham; it appearing by affidavits that the defendants had admitted that there was no defense to the cause of action, and such admissions being really undenied and unexplained by the opposing affidavit of one of the defendants, which appears to be evasive.

Immaterial Issue.

Several plaintiffs, suing as indorsees of promissory notes, alleged that they were partners. *Held*, that this was immaterial.

Appeal by defendants, Morris L. Hallowell, Jr., and Samuel P. Snider, from a judgment of the District Court of Hennepin County, William Lochren, J., entered April 6, 1892, against them for \$10,-295.82.

Action brought by John Dobson and James Dobson, partners, upon two promissory notes. The defendants filed and served a verified answer. On motion this answer was stricken out as sham, and judgment was entered as for want of an answer. From that judgment this appeal is taken.

Cross, Carleton & Cross, for appellants.

The doctrine laid down in Morton v. Jackson, 2 Minn. 219, (Gil. 180.) that denials of material allegations could not be stricken out as sham, has been so much the general doctrine of the Code States, including New York, that the decision of this court in C. N. Nelson Lumber Co. v. Richardson, 31 Minn. 267, changing the rule, is noted in Bliss, Code Pleading, § 422, as practically standing alone. The question was approached on two prior occasions. Barker v. Foster, 29 Minn. 166; Schmitt v. Cassilius, 31 Minn. 7. These decisions were both after that in Hayward v. Grant, 13 Minn. 165, (Gil. 154.) In the case of Wheaton v. Briggs, 35 Minn. 470, this court adhered to the doctrine. In the case of Stevens v. McMillin, 37 Minn. 509, the defendant in her affidavits set up facts that showed her denial to be false. The power, however, is to be exercised cautiously. Wright v. Jewell, 33 Minn. 505; City Bank v. Doll, 33 Minn. 507; Smith v. Betcher, 34 Minn. 218; McDermott v. Deither, 40 Minn. 86.

Keith, Evans, Thompson & Fairchild, for respondents.

It is well settled in this state that answers that are false, and because they are false, will be stricken out, whether they contain only general denials or whether they set up new matter also, or whether they are verified or not; for in whatever form they appear their vice is the same. They may be just as false, just as readily interposed in bad faith, and for the mere purpose of delay and obstructing the administration of justice, and therefore just as mischievous and reprehensible in every respect whatever be the garb in which the falsity is dressed. Barker v. Foster, 29 Minn. 166; C. N. Nelson Lumber Co. v. Richardson, 31 Minn. 267; Stevens v. McMillin, 37 Minn. 509.

There is no attempt to show that plaintiffs in Philadelphia were in any way advised of any defect in these notes when they acquired them, nor that defendants had learned anything that warranted them in so claiming, or in claiming plaintiffs were not bona fide purchasers for value before maturity. Defendants call attention to the fact that there was an extension of time to answer, as though thereby we had conceded to them the right to construct and serve a sham answer, disregarding the reiterated promises to pay as soon as funds were forthcoming and available. Van Loon v. Griffin, 34 Minn. 444; People v. McCumber, 18 N. Y. 315.

DICKINSON, J. This action is to recover against the defendants as makers of two promissory notes, each for the sum of \$5,000, alleged to have been made by the defendants, partners, payable to the order of the defendant Snider, by him indorsed and negotiated, and of which the plaintiffs are alleged to have become the owners before maturity. A verified answer was interposed, purporting to put in issue the alleged partnership of the plaintiffs; admitting the partnership of the defendants; admitting the signing of the notes by the defendants, and the indorsed signature of Snider; but alleging that there was no consideration for the notes, and that they were never delivered or negotiated by the defendants or by their authority, and that the plaintiffs had notice of this. The ownership of the notes by the plaintiffs is also denied.

Upon affidavits the plaintiffs moved that the answer be stricken out as sham. The motion was granted. This is an appeal from the judgment.

It has come to be the rule in this state, settled by numerous decisions of this court, that even a verified answer may be stricken out as sham when its falsity is so clearly shown that it is apparent that the alleged defense is a mere pretense, and not made in good faith. An examination of this case, as presented on the motion, satisfies us that it falls within the conditions above indicated, and that the court was right in its decision of the motion.

As to the alleged partnership of the plaintiffs, it is enough to say that, if the answer raised an issue as to the fact, it was wholly immaterial.

The affidavits on the part of the plaintiffs set forth, at considerable length and with particularity, facts bearing upon the alleged defense that the notes were without consideration, and were never

delivered or negotiated by the defendants, or by their authority. We shall not here refer particularly to the facts so stated. It may be said in brief that it appears from these affidavits that, some two months before the commencement of this action, the plaintiffs' attorneys, having received the notes for collection, presented them personally to both the defendants for payment; that the latter declared their inability to pay them at that time, because of financial embarrassments, which temporarily disabled them from meeting these and other obligations, but stated that negotiations were pending which they expected would soon enable them to pay the notes. It is shown that they admitted their liability on the notes, and promised to pay them, and that although there were continued negotiations upon the subject, in the course of which the defendants offered certain property in payment, they did not intimate that they had any defense to the notes.

Such a showing of the admissions and conduct of the defendants themselves, so inconsistent with the truthfulness of the defense shortly afterwards interposed to the action, called for some reasonable explanation on their part, in opposition to the motion. Loon v. Griffin, 34 Minn. 444, (26 N. W. Rep. 601.) The facts thus shown, of the defendants' recognition and admission of the validity of the notes, were not denied by opposing affidavits, and the only explanation offered was in an affidavit by the defendant Snider, to the effect that he was not certain what notes these were when they were presented to him; that he had not then consulted his attorneys. and was not advised as to his legal rights, and did not know that said notes were, as he afterwards learned, a part of a large number of notes which had been issued without the authority of the defendants, and without any consideration. This does not fairly meet the The defendants presumably had some knowledge of the circumstances under which notes to the amount of \$10,000, admitted to have been signed by them, had passed out of their hands; and having, during continued negotiations for their payment, admitted their validity and their own liability, it was incumbent on them, when the good faith of their answer, inconsistent with their admissions and conduct, was properly called in question, (as it was by this motion,) to offer some real explanation of the matter, and not rest on the bare general averment, pleaded as a defense, and the bare uncircumstantial statement in the affidavit, seemingly evasive, that, when the notes were presented for payment, one of the defendants did not know that these notes were a part of a large number of notes which had been issued without authority and without consideration. several particulars this affidavit obviously, and, as it would seem, studiously, evaded the facts to which the proof and explanation should have been directed; and the case of the plaintiffs, going to show that the defense had not been pleaded in good faith, remained substantially unopposed by denial or explanation. The court was justified under these circumstances in its conclusion that the defense was not real, but sham. We may disregard, as not materially affecting this result, the affidavit of Mr. Barringer, the counsel for the plaintiffs, in Philadelphia, and of Mr. Cross, one of the defendants' attorneys, presenting some conflict as to what occurred between those affiants.

As to the plaintiffs' ownership of the notes, the plaintiffs' case is not only entirely unopposed, but is supported by the defendants' admissions already referred to; and, setting aside the defense as pleaded, as to the issuing of the notes and the want of consideration. it is immaterial whether the plaintiffs acquired them before or after maturity.

Judgment affirmed.

VANDERBURGH, J., did not sit. (Opinion published 54 N. W. Rep. 939.)

St. Paul & Duluth Railroad Co. vs. Village of Hinckley.

Argued April 6, 1893. Decided April 27, 1893.

An Appeal when a Supersedeas.

An appeal from an order refusing a new trial, the stay bond prescribed by 1878 G. S. ch. 86, § 10, being filed, is effectual as a stay, and suspends the right to enter judgment in the court below.

Contempt Excused.

Exley v. Berryhill, 87 Minn. 182, commented upon, and considered as excusing from a charge of contempt one who had entered judgment notwithstanding the pendency of such an appeal.

Original order of this court to Robert C. Saunders, attorney, and Hans Hokanson, street commissioner, of the defendant Village of Hinckley, to show cause April 6, 1893, why they should not be punished for contempt in disobeying a temporary injunction of the District Court pending an appeal to this court.

The plaintiff, the St. Paul & Duluth Railroad Company, commenced an action in the District Court of Pine County to restrain the defendant, the Village of Hinckley, from opening and improving a street of the village across the tracks of its railroad, and obtained a temporary injunction. That action was tried, and on October 13, 1892, findings were filed and judgment ordered for the defendant, dissolving the temporary injunction. The plaintiff made a motion for a new trial, which was denied November 28, 1892. The Railroad Company on December 5, 1892, appealed from that order, and gave a supersedeas bond in the penal sum of \$3,500, approved by the court, pursuant to 1878 G. S. ch. 86, § 10, and on December 17, 1892, the clerk made return to this court. Robert C. Saunders, attorney for the village, on January 18, 1893, entered judgment in the action pursuant to the findings and order of the trial court. commissioner, Hans Hokanson, then proceeded to open and improve Thereupon this court, on the relation and motion of the Railroad Company, ordered that they show cause, if any they had, why they should not be punished for disobeying the injunction pend-The main question is reported post, p. 398. ing the appeal.

Lusk, Bunn & Hadley and J. D. Armstrong, for the relator.

Robert C. Saunders, for respondents.

1878 G. S. ch. 86, § 10, provides that such appeal, when taken from an order, shall stay all proceedings thereon, and save all rights affected thereby, if the appellant executes a bond, etc. The entry of judgment in this case was not a proceeding based upon or dependent upon the order appealed from. Exley v. Berryhill, 37 Minn. 182; Reitan v. Goebel, 35 Minn. 384.

If there was any irregularity in entering the judgment, or if any contempt was committed thereby, it was contempt of the District Court, and not of this court, and the irregularity should have been corrected and the contempt punished upon application to the District Court. This proposition is amply sustained by Eaton v. Cald-

well, 3 Minn. 134, (Gil. 80;) Yale v. Edgerton, 11 Minn. 271, (Gil. 184;) Oldenberg v. Devine, 40 Minn. 409; Lundberg v. Single Men's Endowment Ass'n, 41 Minn. 508; Scott v. Minneapolis, St. P. & S. S. M. Ry. Co., 42 Minn. 179; State ex rel. v. District Court, 52 Minn. 283; Heinlen v. Cross, 63 Cal. 44.

Dickinson, J. This respondent Saunders was the attorney for the defendant, the village of Hinckley, in an action pending in the The cause was tried, and the court made its findings of fact therein, and directed judgment to be entered in favor of the defendant, to the effect, among other things, that a temporary injunction which had been granted in favor of the plaintiff should be The plaintiff made a motion for a new trial, which was refused, and an appeal from the order of refusal was taken to this court, and the stay bond provided in such cases by 1878 G. S. ch. Thereafter this respondent caused judgment to 86, § 10, was filed. be entered in accordance with the previous direction of the District Court, dissolving the temporary injunction. Then the street commissioner of the village proceeded to do what had been prohibited by the injunction,—the opening or doing of work upon premises which appear to be claimed to have been a public street. spondent Saunders, as well as the street commissioner, were then required to show cause before this court why they should not be punished for contempt. As to the latter the proceeding was not pressed. The judgment, though erroneous, was not void, as must be held under our decisions in State v. Young, 44 Minn. 76, (46 N. W. Rep. 204,) and Briggs v. Shea, 48 Minn. 218, (50 N. W. Rep. 1037.) Hence the judgment was probably effectual as a justification of the conduct of the street commissioner.

The respondent Saunders contends that the appeal and the statutory stay bond did not operate to prevent the entry of judgment in accordance with the previous direction of the court. We hold to the contrary, in accordance with what we understand to have been the view which the courts and the profession generally have always taken of the law as it now stands; that is, that an appeal from an order granting or refusing a new trial, and the filing of the bond prescribed by 1878 G. S. ch. 86, § 10, effectually suspends the right to proceed to the entry of judgment, although, as has been considered

in the cases cited above, such stay or suspension affects the regularity of the proceedings rather than the jurisdiction of the court. The decision in Briggs v. Shea, supra, rests upon the assumption, as a matter of course, that such an appeal and stay bond suspend the right to enter judgment. This is also recognized in the opinion in Rcitan v. Goebel, 35 Minn. 384, 385, (29 N. W. Rep. 6.) But, while we suppose that this has been generally understood to be the effect of the statute, what is stated in the opinion in Exley v. Berryhill, 37 Minn. 182, (33 N. W. Rep. 567,) as the reason for that decision, certainly affords some justification to this respondent for his conclusion that the appeal, with a stay bond, from an order refusing a new trial, did not suspend his right to enter the judgment; and for this reason it is considered that the respondent should not be adjudged guilty of a contempt in having so done. Whether the case of Exley v. Berryhill, supra, as to the effect of the appeal as a stay of proceedings, was rightly decided, and whether the particulars in which that case differed from this would justify different conclusions in the two cases, we do not now decide.

Our conclusion upon this point is such that it is unnecessary to consider some other questions presented at the hearing, and the order upon which the respondent was called before us is discharged.

VANDERBURGH, J., did not take part.

Opinion published 54 N. W. Rep. 940.)

CHARLES G. LAYBOURN vs. JOSEPH H. SEYMOUR et al.

Argued by respondent, submitted on brief by appellant, April 11, 1898. Decided April 27, 1898.

Set-Off in Action by Assignee in Insolvency.

Defendants were indebted to a corporation on account. They also held the express contract obligation of the corporation to deliver a certain amount, in value, of manufactured goods. No demand having been made for the goods, the corporation, being insolvent, made a general assignment to the plaintiff for the benefit of its creditors. In an action by the assignee to recover of the defendants on the account, held, that the latter might set off their demand against the insolvent.



Damages for Breach of Contract—Set-Off in Such Case.

By the assignment, the corporation having disabled itself to deliver the goods, the alternative right of the defendants to recover the specified sum in money at once accrued; and this was a subject of set-off under the statute.

Same-In Equity Independent of Statute.

By reason of the insolvency it was a proper subject of set-off in equity, independent of the statute.

Appeal by defendants, Joseph H. Seymour and Frank B. Hart, from an order of the District Court of Hennepin County, *Thomas Canty*, J., made January 11, 1892, denying their motion for a new trial.

In June, 1891, the Flour City Sash & Door Company, a corporation, sold and delivered to defendants sash, doors and goods of like character, to the value of \$401, on which they paid \$170. On April 23, 1891, the corporation, for a valuable consideration, agreed with J. A. Fagan to deliver to him on demand sash, doors, blinds and mouldings to the value of \$375, and soon thereafter delivered thereon such goods to the value of \$150. Thereafter, on May 1, 1891, Fagan sold and transferred the agreement to Miller & Allen, and on the same day Miller & Allen sold and transferred the agreement to the defendants, and the corporation was notified of the transfers. July 21, 1891, the corporation made an assignment of all of its nonexempt property to the plaintiff, Charles G. Laybourn, in trust for its creditors, under Laws 1881, ch. 148. He brought this action to recover the balance of account, \$231. Defendants answered admitting the indebtedness, but pleaded, as a counterclaim, the balance of \$225 due them on the Fagan agreement. The trial court refused the setoff, and ordered judgment for plaintiff, for the \$231 with interest Defendants moved for a new trial, for error in such refusal, and being denied, they appeal.

Willis A. McDowell, for appellants.

The debtor of an insolvent, is entitled to have his debt set off against the amount due from him to the insolvent; if the debt owing by him is due at the date of the assignment. Fry v. Boyd, 3 Gratt. 73; Burrill, Assignments, (5th Ed.) p. 617; Waterman, Set-Off, § 402.

When the corporation placed itself in a position where it could not comply with a demand for the goods, a demand was unnecessary, and the obligation was changed into one payable in money at once. Brooks v. Jewell, 14 Vt. 470; Clarke v. Crandall, 27 Barb. 73; Beeds v. Proehl, 34 Minn. 497; Smith v. Jordan, 13 Minn. 264, (Gil. 246;) Morey v. Enke, 5 Minn. 392, (Gil. 316.)

As no time or place is fixed in the contract for the delivery of the articles, the debtor must, in reasonable time, offer to deliver them. Roberts v. Beatty, 2 Pen. & W. 71; Bixby v. Whitney, 5 Greenl. 192; Rice v. Churchill, 2 Denio, 145; Lobdell v. Hopkins, 5 Cowen, 516.

By the assignment, the corporation became unable to deliver the merchandise specified in the agreement; all its property, by that act, passed to the plaintiff. It ceased to be in trade, and the agreement was converted into a money demand. The only remaining question is, whether a claim not due until the assignment, can be set off against a claim due and owing the assignor. The question has been answered by this court in the affirmative, in Martin v. Pillsbury, 23 Minn. 175.

Charles G. Laybourn, pro se.

The only question in the case is, can this order or agreement be treated as an offset or counterclaim against the claim of the plaintiff in the hands of the assignee? Had the demand been made for the goods prior to the assignment, and refused by the insolvent, there would have existed a claim for damages liquidated and determined by the amount of the order; but, in view of the fact that no demand had been made prior to the assignment, the defendants had no liquidated or other claim for damages, and a claim for unliquidated damages cannot be set off. Cumings v. Morris, 3 Bosw. 560; McCracken v. Elder, 34 Pa. St. 233; Schropshire v. Conrad, 2 Met. (Ky.) 143; Bodman v. Harris, 20 Texas, 31.

No opportunity seems to have been offered the insolvent to deliver goods upon this order prior to the assignment, and certainly no cause of action then existed in favor of the defendants against the insolvent.

Dickinson, J. At the time of the assignment by the insolvent corporation of all its property to this plaintiff for the benefit of its

creditors the defendants were indebted to the corporation for goods sold to them. This is an action to recover the amount of that indebtedness. The defendants assert the right to set off a claim against the corporation which arose as follows: The corporation by its treasurer and managing agent had made an order, directed to the corporation, to deliver to one Fagan sash, doors, blinds, and mouldings to the amount of \$375. This was not signed, but across the face of it the corporation, by its proper agent, wrote its acceptance, with the further words, "Note received in settlement of open account." By assignment this afterwards passed from Fagan to these defendants, who now seek to avail themselves of it by way of At the time the corporation made its assignment under the set-off. insolvent law, this acceptance, as it may be called for convenience, had not been fully satisfied by a delivery of goods to the amount specified, nor had there been any demand for the delivery of the full amount of goods.

The unsigned order thus "accepted" by the corporation constituted an express agreement on its part to deliver goods as therein specified; but that was the extent of its obligation in the first instance. While the conditions remained as they were when it was issued, the corporation could not be called upon to pay the specified amount in money, nor could the "acceptance" have been available as a set-off, under the statute, against a debt due to the corporation, of the nature of that for which this action is prosecuted; but the making of the assignment under the insolvent law changed the situation and the legal rights of the holder of this instrument. The corporation thereby disabled itself from performing the specific obligation expressed in its written undertaking, and hence subjected itself at once to the alternative liability to answer in damages as for breach of contract. The law does not require the doing of a useless thing, and, the corporation having thus disabled itself to specifically perform its agreement, a demand was not necessary to convert the right to demand the goods into a right to compensation in money. The situation of defendants is the same as it would have been if, before the assignment in insolvency, they had demanded the goods, and the corporation, from inability to comply with the demand or from other cause, had refused to deliver the same.

Such being the case, this demand was allowable as a set-off by the terms of the statute, which, "in an action arising on contract," allows, as a counterclaim or set-off, "any other cause of action, arising also on contract, and existing at the commencement of the action." 1878 G. S. ch. 66, § 97.

But by reason of the insolvency of the corporation such a set-off is allowable in equity, even though the case be not within the statute. The equitable right of set-off, or "stoppage," as it was formerly called, was not derived from, nor is it dependent upon, statutes,-Waterman, Set-Off, § 398; Rothschild v. Mack, 115 N. Y. 1, 8, (21 N. E. Rep. 726;) Becker v. Northway, 44 Minn. 61, (46 N. W. Rep. 210;) Freeman v. Lomas, 9 Hare, 109, 113,—although its exercise is limited to cases involving some distinct equity, independent of the mere existence of mutual but unconnected accounts or demands. The insolvency of the party against whose demand the other party claims the right of set-off has been recognized as affording a sufficient reason for allowing the set-off in equity, at least where the debt sought to be set off Martin v. Pillsbury, 23 Minn. 175; Hunt v. Conis already mature. rad, 47 Minn. 557, (50 N. W. Rep. 614;) Lindsay v. Jackson, 2 Paige, 581; Richards v. La Tourette, 119 N. Y. 54, (23 N. E. Rep. 531;) Pond v. Smith, 4 Conn. 297; Colt v. Brown, 12 Gray, 233; American Bank v. Wall, 56 Me. 167; Tuscumbia, C. & D. R. Co. v. Rhodes, 8 Ala. 206; Krause v. Beitel, 3 Rawle, 199; Chenault v. Bush, 84 Ky. 528, (2 S. W. Rep. 160;) Richardson v. Parker, 2 Swan, 529. Even if it be, as was considered in the late case of Fera v. Wickham, 135 N. Y. 223, (31 N. E. Rep. 1028,) that, in the case of an insolvent who has assigned his property for the benefit of creditors, a set-off will not be allowed of debts to the insolvent not due at the time of the assignment, that would not defeat the right of set-off in this case. debt here sought to be set off became a money demand, presently due, at the very instant when the assignment was made.

Our conclusion is that the defendants were entitled to have their demand set off against that of the plaintiff, and the order denying a new trial must be reversed.

VANDERBURGH, J., did not take part in this case. (Opinion published 54 N. W. Rep. 911.)



GEORGE W. BYRNES vs. JOHN VOLZ et al.

Submitted on briefs April 10, 1893. Decided April 27, 1893.

Transfers of Goods and Chattels, Fraudulent as against Creditors. By force of the common law, partially declared in our statute of frauds, transfers of goods and chattels with intent to hinder or defraud "creditors or other persons of their lawful actions," etc., are voidable, although "goods and chattels" are not named in our statute.

Same—As against a Wife Suing for Divorce and Alimony.

This principle is applicable with respect to others than existing creditors, in the strict sense of the word. It is operative in favor of a wife suing for a divorce and alimony. It is operative also as to subsequent creditors intended, to be defrauded; and the wife becomes such upon the recovery of judgment for alimony.

Same-The Transferee cannot Retain for His Own Claim.

Property having been transferred by the husband, pending the action for divorce, in consideration in part of an agreement by the purchaser to board or support the husband, the intent of both parties being to render ineffectual any judgment which the wife might recover, she may avoid the transfer after she recovers judgment. The illegal consideration renders the transfer void, even though it was coupled with the further consideration that the purchaser should pay certain debts of the husband. The purchaser, being guilty of actual fraud, is answerable for the proceeds of the property, without allowance even for debts paid in accordance with his agreement.

Appeal by Charles Thonet, one of the defendants, from a judgment of the District Court of Rice County, *Thomas S. Buckham*, J., entered September 13, 1892, against him for \$350.49 and costs.

Eveline L Schacht commenced an action June 17, 1891, against her husband, Adolph F. Schacht, for divorce and alimony, and on January 28, 1892, recovered judgment as prayed with \$334.23 for alimony, counsel fees and costs. Execution was issued and returned unsatisfied, and in proceedings supplemental thereto, the plaintiff, George W. Byrnes, was on February 5, 1892, appointed receiver of Schacht's nonexempt property. Schacht held a note for \$500, due in three years, without interest, given him by defendant John Volz. In December, 1891, he indorsed and transferred it to his son-in-law, the defendant Charles Thonet, for \$425, to be paid as follows: \$200

in board for one year next ensuing, \$45 debt then owing by Schacht to Thonet, and the balance on certain debts that Schacht was owing to other parties named. Thonet then knew of the divorce suit, and that Schacht intended by the sale of the note to prevent his wife from collecting alimony. After the supplemental proceedings were commenced, Volz bought in his note for \$425, and Thonet paid out \$209.50 of the money upon just debts that Schacht was owing.

The receiver brought this action against Schacht, Thonet and Volz, and on proof of these facts, recovered judgment against Thonet for the amount due on the wife's judgment, with interest and costs. Thonet alone appeals.

Thomas H. Quinn, for appellant.

A conveyance of personal property is not void, under the statute relating to fraudulent conveyances, because made with the purpose of defeating the collection of a judgment for alimony subsequently obtained by the wife. 1878 G. S. ch. 41, § 18. The wife is not included in the term "creditor," as used in the statute. 1878 G. S. ch. 41, § 16. These sections do not give the wife a right of action to set aside fraudulent transfers of personal property.

Assuming the conveyance fraudulent as to the divorced wife, she has no further right than to recover the property remaining in Thonet's hands. If Schacht had a right to pay his debts out of his property, then he had a right to pay Thonet the forty-five dollars he owed him, and to authorize the payment by Thonet of his other debts. The question must be, what moneys did Thonet have in his hands belonging to Schacht at the commencement of this action? To now charge Thonet with the repayment of the amount paid by him for Schacht's debts, would be to punish him for doing an act that Schacht was at liberty to do, and for which, if done by him, Mrs. Schacht could not complain.

H. S. Gipson, for respondent.

At the time of the transfer of the \$500 note to Thonet, the wife was a creditor in the sense and spirit of the law relative to conveyances and transfers with intent to defraud creditors. Livermore v. Boutelle, 11 Gray, 217; Burrows v. Purple, 107 Mass. 428; Chase v. Chase, 105 Mass. 385; Stuart v. Stuart, 123 Mass. 370; Morrison v.

Morrison, 49 N. H. 69; Picket v. Garrison, 76 Iowa, 347; Damon v. Damon, 28 Wis. 510; Way v. Way, 67 Wis. 662; Draper v. Draper, 68 Ill. 17; Tyler v. Tyler, 126 Ill. 525; Bishop v. Redmond, 83 Ind. 157; Foster v. Foster, 56 Vt. 540; Bailey v. Bailey, 61 Me. 361; Lott v. Kaiser, 61 Texas, 666; Nix v. Nix, 10 Heisk. 546; Atkins v. Atkins, 18 Neb. 474; Gregory v. Filbeck, 12 Col. 379.

The omission in 1878 G. S. ch. 41, § 18, of a provision relating to fraudulent conveyances and transfers of personal property, does not abrogate the common-law rule, that such transfers are likewise void. Blackman v. Wheaton, 13 Minn. 326, (Gil. 299;) Benton v. Snyder, 22 Minn. 247; Fox v. Hills, 1 Conn. 294; Sands v. Codwise, 4 Johns. 537.

Our statute and the English statutes, 13 Elizabeth, ch. 5, are only declaratory of the common law which vitiated equally, fraudulent conveyances of real estate, and transfers of personal property. Bouslough v. Bouslough, 68 Pa. St. 495; Reeg v. Burnham, 55 Mich. 39; Brooks v. Caughran, 3 Head, 465.

Lord Mansfield said, (Cowper, 432:) "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes; 13 Elizabeth, ch. 5, and 27 Elizabeth, ch. 4." These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud, as well as to lands and tenements as to goods and chattels.

It has been held that a fraudulent transfer made in contemplation of a breach of promise of marriage is voidable. Hoffman v. Junk, 51 Wis. 613; McVeigh v. Ritenour, 40 Ohio St. 107. Also one to avoid a claim founded in tort, Jackson v. Myers, 18 Johns. 426; or for libel or slander; Cooke v. Cooke, 43 Md. 522; Hall v. Sands, 52 Me. 355; or one founded on seduction of wife. Hunsinger v. Hofer, 110 Ind. 390.

A bona fide purchaser must have been without notice, not only when he received the transfer, but at the time he actually paid the consideration therefor. Minor v. Willoughby & P., 3 Minn. 225, (Gil. 154;) Marsh v. Armstrong, 20 Minn. 81, (Gil. 66;) Dixon v. Hill, 5 Mich. 404; Warner v. Whittaker, 6 Mich. 133; Blanchard v. Tyler,

12 Mich. 339; Macauley v. Smith, 132 N. Y. 524; Kohl v. Lynn, 34 Mich. 360; Dows v. Kidder, 84 N. Y. 121.

Although he has given security for the purchase money, yet, if it was not in fact paid before notice, he will not be protected. *Jewett* v. *Palmer*, 7 Johns. Ch. 65; *Jackson* v. *McChesney*, 7 Cowen, 361; *Thomas* v. *Stone*, Walker, Ch. 117; *Weaver* v. *Barden*, 49 N. Y. 286.

The only claim here is, that Thonet had given a promise merely, to the fraudulent assignor, Schacht, for future support, with no security whatever for its fulfillment. It was fraudulent per se. Henry v. Hinman, 25 Minn. 199; Tupper v. Thompson, 26 Minn. 385; Moore v. Wood, 100 Ill. 451; Gordon v. Reynolds, 114 Ill. 118.

The antecedent debt which Schacht owed Thonet, of \$45, did not constitute a valuable consideration entitling Thonet to protection. Baze v. Arper, 6 Minn. 220, (Gil. 142;) McGraw v. Solomon, 83 Mich. 442; Edson v. Hudson, 83 Mich. 450.

Thonet cannot be protected even though he paid at the time of the transfer full value for the note. Gardinier v. Otis, 13 Wis. 461; Avery v. Johann, 27 Wis. 246; Ferguson v. Hillman, 55 Wis. 181; Duvis v. Leopold, 87 N. Y. 620; Billings v. Russell, 101 N. Y. 226; Baldwin v. Short, 125 N. Y. 553; Hamilton Nat. Bank v. Halsted, 134 N. Y. 520; Lobstein v. Lehn, 120 Ill. 549.

The court properly directed entry of a money-judgment against Thonet. A court of equity may adapt its relief to the exigencies of the case, and may, when that is all the relief needed, order a sum of money to be paid plaintiff, and give him a personal judgment therefor. Murtha v. Curley, 90 N. Y. 372; Lynch v. Metropolitan Elevated Ry. Co., 129 N. Y. 274; Triggs v. Jones, 46 Minn. 277.

Dickinson, J. This appeal from a judgment of the district court brings in question the correctness of the legal conclusions of that court from the facts found by it. The facts as found by the court may be thus stated: During the pendency of an action for divorce, prosecuted by a Mrs. Schacht against her husband, Adolph F. Schacht, one of the defendants in this action, the said Schacht indorsed and transferred to this defendant, Thonet, a promissory note for the sum of \$500, the same being the property of Schacht. In consideration thereof Thonet agreed to pay certain debts of v.53m.—8

Schacht, and to board the latter for one year, the value of which board was fixed at \$200. Schacht was also indebted to Thonet in the sum of \$45, which indebtedness was agreed to be discharged by this transfer. Thonet knew of the pendency of the divorce suit, and this note was transferred by Schacht, and was received by Thonet, for the purpose and with the intent of hindering, delaying, and defrauding the wife as to any alimony which might be awarded to her, and to render ineffectual any money judgment which she might recover in such pending action. Subsequent to the rendition of judgment in favor of the wife, awarding a divorce with alimony, and after the return unsatisfied of an execution against Schacht, and the institution of proceedings supplementary to execution, in which Thonet had been required to appear and testify as to property of the judgment debtor in his hands, Thonet received payment of the amount then due on the note, \$425. Thereafter he paid out for the defendant Schacht, for debts of the latter justly due, the sum of \$209.50, aside from his own debt of \$45. Schacht is insolvent, and has no property subject to execu-This plaintiff was appointed receiver of his property in proceedings supplementary to execution. The conclusion of the court was that the transfer of the note to Thonet was fraudulent as to the wife of Schacht, and that the proceeds of it in his hands were held by him subject to her right to enforce payment of her judgment therefrom, and that the plaintiff was entitled to recover from him (Thonet) the amount of her judgment, not exceeding the amount received by him. Judgment was entered to this effect, and Thonet appeals.

For the purposes of this decision we may assume that such a transfer of the note would not be covered by any statute having the effect to avoid the same, unless it be 1878 G. S. ch. 41, § 18, which declares void transfers of real property made, as well as bonds or other evidences of debt given, with intent to hinder, delay, or defraud "creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands." It is said that the wife of the defendant in the pending divorce suit, in whose behalf this action is prosecuted, was not a "creditor;" that she is not within the protection of the statute; and that as to her the transfer was not voidable. This statute is founded upon that of 13 Eliz. ch. 5, which included in

terms "goods and chattels" with other property, transfers of which, with the specified fraudulent intent, were declared void. That statute has been held merely declaratory of a rule of the common law, and, notwithstanding the omission of the words "goods and chattels" in our enactment, the common-law rule, partially expressed therein, remains in force. The transfer of such property with the fraudulent intent specified in the statute is voidable. Piper v. Johnston, 12 Minn. 60, 66, (Gil. 27;) Blackman v. Wheaton, 13 Minn. 326, (Gil. 299;) Hicks v. Stone, 13 Minn. 434, 440, (Gil. 398;) Benton v. Snyder, 22 Minn. 247; Fox v. Hills, 1 Conn. 294.

The right to call in question the validity of such transfers on the ground of fraud extends to others than creditors in the strict sense of that term. Among the classes of "other persons" at whose instance such transfers may be avoided, because of the intent to defraud them in respect to their "lawful actions, damages, forfeitures, debts, or demands," is that of the wife prosecuting, or about to prosecute, a suit for divorce and alimony, when the husband, with intent to render ineffectual any recovery by her, transfers his property to another not a purchaser in good faith. Twyne's Case, 3 Coke, 80, 82a; Livermore v. Boutelle, 11 Gray, 217; Morrison v. Morrison, 49 N. H. 69; Bailey v. Bailey, 61 Me. 361; Feigley v. Feigley, 7 Md. 537; Bouslough v. Bouslough, 68 Pa. St. 495; Draper v. Draper, 68 Ill. 17; Tyler v. Tyler, 126 Ill. 525, (21 N. E. Rep. 616;) Boog v. Boog, 78 Iowa, 524, (43 N. W. Rep. 515.) But, irrespective of the fact that the statute applies to "other persons" besides "creditors," the wife, upon the rendition of the judgment in the pending suit, became an actual creditor; and even in this view of the case she might avoid the transfer made with intent to defraud her, for a transfer made with intent to defraud even subsequent creditors is voidable. Livermore v. Boutelle, supra; Plunkett v. Plunkett, 114 Ind. 484, (16 N. E. Rep. 612, and 17 N. E. Rep. 562.)

The appellant was an active party with the husband in the accomplishment of the fraudulent purpose. The agreement to board Schacht for a year, made with the intent to defeat or render ineffectual the claim of the wife in the pending action, was a fraud upon her, condemned alike by the common law and by the statute, and, being a substantial part of the consideration for the

transfer of the note, that alone rendered the transfer voidable, notwithstanding the further consideration that Thonet should pay certain debts of Schacht, much less in amount, as it seems, than the value of the property transferred. Albee v. Webster, 16 N. H. 362; Morrison v. Morrison, supra; Sidensparker v. Sidensparker, 52 Me. 481, 490; Twyne's Case, supra.

Thonet, having actively participated in the fraud, is not entitled to protection even as to the amounts paid by him out of the proceeds of the note which he collected. The transfer to him is to be treated as void in its entirety, and he is answerable for the proceeds of the note, without deduction even on account of his own debt. Thompson v. Bickford, 19 Minn. 17, (Gil. 1.) The case will be seen to be distinguishable from one where the property of the debtor is appropriated wholly in payment of the debts of preferred creditors, there being reserved no benefit to himself from the transfer.

Judgment affirmed.

Vanderburgh, J., took no part. (Opinion publishe i 54 N. W. Rep. 942.)

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CHRISTIAN C. BERGH vs. SAMUEL G. SLOAN.

Submitted on briefs April 10, 1898. Decided April 27, 1893.

Practice-No Exception Taken to the Charge to the Jury.

A party to an action, who acquiesces in the instruction of the court to the jury as to the law of the case, will not be heard afterwards to assert that the law was otherwise, as a reason for setting aside the verdict.

Verdict Supported by the Evidence.

Evidence held to justify the verdict.

Appeal by defendant, Samuel G. Sloan, from an order of the District Court of Ramsey County, W. D. Cornish, J., made December 2, 1892, denying his motion for a new trial.

On July 2, 1887, James Stinson sold at auction a block of land in one of his Additions to St. Paul. It was bid in by the plaintiff, Christian C. Bergh. He paid the price, \$4,000, and gave the defendant a memorandum in writing signed by him, which read as follows:

"To Sam'l G. Sloan, St. Paul: I hereby acknowledge that you and myself are equally interested in the purchase of James Stinson of block 12, Stinson's Francis Street Addition to St. Paul, for the sum of \$4,000, and that for convenience of transfer the title has been taken from said Stinson in my name only; one-half of price paid for said block, \$2,000, to be paid by you on or before three years from the date of this writing, with interest thereon at the rate of eight per cent. per annum, which said interest is to be paid annually; all taxes and assessments on said block are to be paid by us, share and share alike, whenever they become due. If property is not sold before expiration of above time of three years, I hereby agree to deed to you on payment of said principal sum of two thousand dollars, one-half of same free and clear.

"Dated at St. Paul, Minn., July 2, 1887

"C. C. BERGH. [Seal.]

"Attest: R. B. GALUSHA."

This was the only writing between the parties. It was not signed by the defendant. The property remained unsold, and defendant paid interest on \$2,000 for three years, and half the taxes, and then refused to pay more. Plaintiff tendered a deed of an undivided half of the block, and on June 4, 1892, brought this action to recover one-half the purchase price, and half of the subsequent taxes and interest. The Judge charged the jury, among other things, that this contract might be used by them, but not to determine what the contract was between the parties; that must be found from the testimony outside of this agreement. He said; if you find that there was an agreement such as the plaintiff claims, and that in connection with that agreement an advance was made by the plaintiff, and made for this defendant in the joint enterprise of buying this property for the common purpose of the two and for the common profit of the two, then unless there has been some abandonment or release of the contract, the plaintiff would be entitled to If on the other hand, you find that the contention of the defendant is correct, and that there was no joint purchase of this

property, no mutual agreement between them with reference to buying this property for their common profit, then the defendant would be entitled to a verdict at your hands.

The defendant took no exception to this charge, or to any part of it, and made no request for any further or different charge. The jury returned a verdict for plaintiff, and assessed his damages at \$2,318.48. Defendant moved for a new trial, and being denied, appeals.

R. B. Galusha, for appellant.

Lewis E. Jones, for respondent.

Dickinson, J. This is an appeal by the defendant from an order refusing a new trial. The case of the plaintiff, as set forth in his complaint, and as presented at the trial, was, in brief, that these parties entered into an agreement, which he claims to have been of the nature of a partnership, for the purchase of a certain tract of land, it being agreed that the plaintiff should pay the purchase price, \$4,000, and for the convenience of the parties take the title in his own name, but for the benefit of both parties; that they should bear equally the burden of taxation; that the defendant should pay to the plaintiff interest on one half of the purchase price paid; that, upon a sale of the property being made, they should share in the profits; that within three years the defendant would repay to plaintiff one half of the purchase money, with interest, if no sale should have been made; and that one half of the property should then be conveyed to him. The purchase was made, the title conveyed to the plaintiff, who paid the price as above indicated. The three years having passed, and the land remaining unsold, the plaintiff seeks by this action to recover one half of the purchase price paid by him, the defendant having refused to pay the same.

The defendant denies that there was any partnership agreement, alleging that the plaintiff bought the property solely for himself, and that his (defendant's) agreement, made after such purchase, was merely a verbal, and hence void, agreement on his part to purchase one half of the land from the plaintiff.

The appellant contends that the evidence did not support the plaintiff's claim as to the nature of the agreement. In this the appellant cannot be sustained. The evidence fully and beyond any

reasonable question justified the verdict in favor of the plaintiff so far as concerned the facts in issue.

But it is said that the agreement, even according to the plaintiff's proof of it, did not constitute a partnership agreement, and was void under the statute of frauds. This point is not available to the appellant. The court instructed the jury, in substance, that if the agreement was as claimed by the plaintiff, and if the property was purchased in accordance therewith, and the purchase price advanced by the plaintiff, as a joint enterprise and for their common profit, the plaintiff would be entitled to recover. ception was taken to this as being the law of the case by which the jury should be guided in the discharge of their duty. appellant must be deemed to have acquiesced in this statement of the law as applied to this case. The verdict was rightly founded upon that proposition, and a contrary theory of the case cannot now be advanced as a reason for avoiding the result of the trial. Smith v. Pearson, 44 Minn. 397, (46 N. W. Rep. 849;) Loudy v. Clarke, 45 Minn. 477, (48 N. W. Rep. 25;) Coburn v. Life Indem. & Invest. Co., 52 Minn. 424, (54 N. W. Rep. 373.) This controls the determination of this appeal.

Order affirmed.

VANDERBURGH, J., did not participate.

(Opinion published 54 N. W. Rep. 943.)

Application for reargument denied May 9, 1893.

WILLIAM H. HANSCOM vs. MINNEAPOLIS STREET-RAILWAY Co.

Submitted on briefs April 4, 1893. Decided April 27, 1893.

Agency, Evidence of, Construed.

Evidence that an agent of a street-railway company was authorized by it generally to see that injured persons were taken where medical aid could be given, construed as justifying the conclusion that the agent was authorized to *employ* medical aid in such cases.

Appeal by defendant, the Minneapolis Street-Railway Company, from a judgment of the District Court of Hennepin County, Fred-



erick Hooker, J., rendered January 28, 1893, in favor of plaintiff, William H. Hanscom, for \$99.71.

Andrew Bloomfield, a boy, had his left forearm broken July 30, 1892, in getting off a Cedar avenue car in Minneapolis. Shaw, defendant's inspector, came along in the next car, and found the boy sitting on the curbstone crying, and took him to plaintiff, a surgeon, and asked him to attend to the boy. Shaw's instructions from the company were, in case of accidents, to see that the injured were taken where medical aid could be given. Plaintiff set the arm, and visited the boy several times, and afterwards presented his It was not paid, and he brought this action before a Justice of the Peace, and recovered judgment October 28, 1892, for \$75 and Defendant appealed to the District Court on questions of law alone, and had all the evidence returned. The judgment of the Justice was there affirmed, and defendant then appealed to this court.

Koon, Whelan & Bennett, for appellant.

Shaw is not shown to have been authorized to employ plaintiff on behalf of the Railway Company. Peninsular R. Co. v. Gary, 22 Fla. 356; Mayberry v. Chicago, &c., Ry. Co., 75 Mo. 492; Cooper v. New York Cent. & H. R. R. Co., 6 Hun, 276; Schriver v. Stevens, 12 Pa. St. 258; Atchison & N. R. Co. v. Reecher, 24 Kan. 228; Atlantic & P. R. Co. v. Reisner, 18 Kan. 458; St. Louis, A. & T. Ry. Co. v. Hoover, 53 Ark. 377; Terre Haute, &c., R. Co. v. Stockwell, 118 Ind. 98; Terre Haute & I. R. Co. v. McMurray, 98 Ind. 358.

Jay W. Crane, for respondent.

When the superintendent, or other person in authority, of a rail-way company, is notified that an employe has engaged a physician to attend a person injured on the railway, on the credit of the company, such superintendent, or other person in authority, must at once disavow such employment, and notify the physician of the fact, or the company will be held to have ratified such employment. Toledo, W. & W. R. Co. v. Prince, 50 Ill. 26; Indianapolis & St. L. R. Co. v. Morris, 67 Ill. 295; Cairo & St. L. R. Co. v. Mahoney, 82 Ill. 73; Pacific R. Co. v. Thomas, 19 Kan. 256; Stearns v. Johnson, 19 Minn. 540, (Gil. 470.)

DICKINSON, J. While a boy was getting off one of the defendant's street cars his arm was broken. He was taken by an agent or servant of the defendant, one Shaw, to the plaintiff's office, he being a physician and surgeon. He performed the necessary surgical services, treating the boy until recovery. By this action he seeks to recover from the defendant for such services. The evidence tended to show that when Shaw took the boy to the plaintiff's office he requested the plaintiff to attend to the case, and assured him that the defendant would be responsible. The question is presented as to Shaw's authority to thus bind the defendant. He appears to have been an "inspector," whose general duties were to supervise the conduct of other employes in the car service, he acting as their superior. If no more than this had been shown, perhaps it could not have been inferred that he had authority from the defendant to employ a surgeon to treat an injured passenger; but it was shown that the defendant had instructed Shaw, in case of accidents, "to see that those injured were taken somewhere where medical aid could be given," and that he took this boy to the plaintiff pursuant to such instruc-This instruction may well be regarded as contemplating the specified action on the part of Shaw, of his own volition, and without any request by the persons injured; and so he appears to have acted in the case under consideration. Neither the boy, nor any one in his behalf, appears to have made any request or to have exercised any choice or volition in the matter. It may be inferred from the evidence that Shaw, acting upon the defendant's general instructions, as above stated, took the boy to this surgeon, selected by himself, in order that the broken arm might be properly treated. evidence already referred to, as to Shaw's authority in such cases, it might reasonably be considered, and so the justice may be supposed to have viewed the case, that Shaw's instructions did not contemplate or mean merely that he should remove injured persons to such a place that medical aid could be there bestowed, if a physician or surgeon should come there, by chance or in response to the request or call of any person, but rather that the meaning of his instructions was to place such persons under proper medical or surgical treatment,—to see that they should receive such treatment. ing the evidence, it went to show that Shaw's authority was such that the defendant became chargeable upon his employment of the plaintiff in behalf of the defendant. Hence it is not necessary to consider the subject of ratification.

Judgment affirmed.

VANDERBURGH, J., did not participate in this decision. (Opinion published 54 N. W. Rep. 944.)

JOHN E. CHISHOLM VS. NORTHERN PACIFIC RAILROAD Co.

Argued by appellant, submitted on brief by respondent, April 10, 1893. Decided April 27, 1893.

Negligence-Gate Open at Farm Crossing.

Evidence held sufficient to justify a verdict that defendant was guilty of negligence in not maintaining a proper gate at a farm crossing.

Appeal by defendant, the Northern Pacific Railroad Company, from a judgment of the District Court of Crow Wing County, Geo. W. Holland, J., entered June 10, 1892, against it for \$184.57.

November 10, 1891, five cows belonging to plaintiff, John E. Chisholm, were killed at a farm crossing on defendant's railroad in Todd County. He brought this action in the Municipal Court of the City of Brainard, and obtained judgment for their value. Defendant appealed to the District Court on questions of both law and fact, and the case was again tried in that court on April 5, 1892, when plaintiff had a verdict for \$130. Judgment was entered thereon, and defendant appeals.

Leon E. Lum, J. C. Bullitt, and Tilden R. Selmes, for appellant. True & Wetherby, for respondent.

MITCHELL, J. The evidence is undisputed that plaintiff's cattle escaped from an inclosure near, but not adjoining, defendant's railway, and then got upon the railway at a farm crossing, through an open gate constituting a part of the fence which the defendant was required to maintain along its road.

It is urged that plaintiff himself was guilty of negligence because the field in which he put his cattle was not inclosed with a proper fence, but we think the most that can be claimed for the evidence on this point is that it made a question for the jury.

If, as defendant claims, the gate had been in all respects in good order, but had been, the evening before, without the knowledge of the section men, opened, and left open, by some stranger, a very different case would have been presented. But the evidence is very clear that the apparatus for fastening the gate had been for weeks, or even months, so much out of order that it was quite difficult to fasten it, unless a person knew exactly how to manage it, and that as a consequence of this defective condition the gate was very frequently left open, or at least unfastened, so that the slightest force against it would cause it to open. This was sufficient to justify the jury in finding that the defendant was guilty of negligence. The fact that a stranger, who found the gate open the night before the accident, did not shut it, does not relieve the defendant from the consequences of its negligence.

Judgment affirmed.

VANDERBURGH, J., absent, took no part. (Opinion published 54 N. W. Rep. 1031.)

PILLSBURY-WASHBURN FLOWR-MILLS Co. vs. Jonas M. KISTLER.

Submitted on briefs April 17, 1893. Decided April 27, 1898.

Parol Trust on an Absolute Conveyance is Invalid.

An express trust in favor of the grantor cannot be ingrafted on a conveyance, absolute in its terms, either by oral proof, or, under the doctrine of "part performance," by proof that the grantor, with the consent of the grantee, remained in possession, and expended money in betterments.

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Appeal by defendant, Jonas M. Kistler, from an order of the District Court of Hennepin County, *Charles M. Pond*, J., made December 2, 1892, denying his motion for a new trial.

George W. Probst was on September 23, 1890, the owner of an undivided third of lot eight (8) in block three (3) in Rodell & Noerenberg's Addition to Minneapolis, on which was a building, a part of

which he and his wife occupied as their homestead. He and his wife had at times disagreed, and he was desirous of placing the title to this property in such a position that he could sell it, if he saw fit, without her consent. He on that day induced her to join with him in a warranty deed conveying the property, without consideration, to the defendant, Jonas M. Kistler. The deed was made and immediately recorded. He and Kistler had at the time an oral agreement that Kistler should hold the title in trust for him, and convey it as he should direct. Kistler gave Probst his check for \$900 for the property, and the next day Probst drew the money, and paid it back to Kistler. Probst continued to occupy the property as his homestead until November of that year, when he removed therefrom, and has not since occupied it; but he has ever since paid the taxes, and made necessary repairs upon it and exercised control He also paid his share of the expense of an addition to the building. Kistler has never taken possession of the property or claimed to own it, but has at various times stated that he had no right to, or interest in, the property.

Between June 3, 1891, and February 17, 1892, the plaintiff, Pillsbury-Washburn Flour-Mills Company, a corporation, sold and delivered flour to "Probst & Co.," a copartnership, of which George W. Probst was a member; and on May 11, 1892, the corporation obtained judgment for \$108.62 therefor against the members of the copartnership, and a writ of execution issued upon the judgment was returned unsatisfied. The corporation then commenced this action against Kistler only, stating the facts above recited, but no others, and it asked judgment that the property belonged to George W. Probst, and that its judgment was a lien thereon, and that the third of the lot be sold to pay the judgment.

The action was tried September 29, 1892, and proof was made of these facts. The court made findings accordingly, and ordered judgment as prayed in the complaint. Defendant moved for a new trial, and being denied, appeals from the order refusing it.

Day & Enches, for appellant.

Upon the trial below, the court overruled defendant's objection, and received evidence of an oral agreement made between Probst and defendant, tending to show an express trust concerning the premises. 1878 G. S. ch. 41, § 10. Such oral agreement did not create a trust or vest in Probst any estate in the land; because, said agreement was void and of no force or effect under the statute of frauds. Plaintiff does not allege any fraud or fraudulent intent as to creditors, or otherwise, in making the transfer. Wolford v. Farnham, 44 Minn. 159; Randall v. Constans, 33 Minn. 329; Conlan v. Grace, 36 Minn. 276; Tatge v. Tatge, 34 Minn. 272; Johnson v. Johnson, 16 Minn. 512, (Gil. 462;) Stevenson v. Crapnell, 114 Ill. 19; Jackson v. Cleveland, 15 Mich. 94; Dunn v. Dunn, 82 Ind. 42; Manning v. Pippen, 86 Ala. 357.

The indebtedness upon which judgment was obtained against Probst was contracted long after the deed in question was made and recorded. Probst was solvent and not indebted to any person at the time he transferred the land in question. The complaint does not attack the deed on the ground of fraud, or because of its being fraudulent as to existing or subsequent creditors of Probst. The sole ground upon which it proceeds is, that the deed was a voluntary deed, and is void as against subsequent creditors of Probst. Yeatman v. Savings Inst., 95 U. S. 764; Stewart v. Platt, 101 U. S. 731; Moore v. Page, 111 U. S. 117; Schreyer v. Scott, 134 U. S. 405; Horbach v. Hill, 112 U. S. 144.

A subsequent creditor cannot avoid a conveyance by his debtor, not made to defraud him or any other existing or subsequent creditor. Bruggerman v. Hoerr, 7 Minn. 337, (Gil. 264;) Stone v. Myers, 9 Minn. 303, (Gil. 287;) Sanders v. Chandler, 26 Minn. 273; Hartman v. Weiland, 36 Minn. 223; Bloom v. Moy, 43 Minn. 397; Fullington v. Northwestern I. & B. Ass'n, 48 Minn. 490.

The premises were the homestead of Probst at the time he conveyed them to appellant, on September 23, 1890; and he had the right to convey them without consideration as against creditors. Morrison v. Abbott, 27 Minn. 116; Ferguson v. Kumler, 27 Minn. 156; Furman v. Tenny, 28 Minn. 77; Baldwin v. Rogers, 28 Minn. 544.

C. S. Jelley, for respondent.

Probst deeded to Kistler under an agreement that Kistler should deed to such person as Probst should designate. Probst remained

in possession of the premises, and made repairs upon, and built an addition to the building, paying therefor himself by virtue of said agreement, thus taking the contract out of the statute. no claim under an oral trust, and we do not claim that the deed to Kistler paid Probst some money and Kistler was fraudulent. Probst, on the following day, paid the whole of it back to Kistler. Pursuant to their agreement Probst remained in possession of the property, made and paid for repairs to the building, and together with the other tenants in common, constructed an addition to the building, and paid his part of the expenses therefor, thus taking the oral contract of Kistler, to redeed the property, out of the statute, and making the contract as good, as though originally made in writing. The plaintiff claims that when it docketed its judgment against Probst in the District Court, Probst was the owner of the property in question, and that the judgment was a lien on that property.

The making of substantial improvements by the vendee in possession, as was done in this case, is such a part performance, as takes the agreement out of the statute of frauds. And any act which the party to the contract might have asserted and relied on, may be asserted and relied on by those claiming under him. Brown v. Hoag, 35 Minn. 373; Pfiffner v. Stillwater & St. P. R. Co., 23 Minn. 343; Gill v. Newell, 13 Minn. 462, (Gil. 430;) Ryan v. Dox, 34 N. Y. 307.

MITCHELL, J. The allegations of the complaint (denied by the answer) are that a conveyance of a certain lot in Minneapolis, executed by one Probst to defendant in September, 1890, was made without consideration, in trust for the use of the grantor, and the relief asked is that it be adjudged the property of Probst, and subject to the lien of a judgment obtained by plaintiff against Probst in May, 1892, on an indebtedness contracted between June, 1891, and February, 1892. It is not alleged or claimed that the conveyance by Probst was made with any intent to defraud his creditors, either existing or subsequent. In fact, it stands admitted that, at the date of the conveyance, he owed no debts, and there is nothing to show that it that time he had in contemplation contracting any. Plaintiff's right to maintain the action is predicated solely upon the proposition that

the conveyance was made in trust for the use of the grantor, and hence is beneficially his property. The conveyance to defendant was in terms absolute, but the plaintiff was permitted, over the objection and exception of defendant, to introduce evidence tending to prove an oral agreement between him and Probst that the former was to hold the title in trust for the latter. This was error. If the conveyance had been attacked on the ground that it was made for the purpose of defrauding creditors, the want of consideration or a secret trust for the benefit of the grantor could have been proven by parol, for the statute of frauds does not apply to secret trusts and confidences for the purpose of defrauding creditors.

But the conveyance is not assailed on any such ground. Therefore, in order to recover, plaintiff was bound to prove just what he had alleged, to wit, that the conveyance was made in trust for the use of the grantor, Probst. But this it could not do by verbal proof any more than Probst could have done had he been plaintiff. To do so would be to disregard, not only the statute of frauds, but also a very elementary rule of evidence. That Probst could not have set up any such trust by means of verbal proof would not be claimed; but the case is as much within the statute of frauds and the mischiefs it was designed to prevent as if Probst himself had been plaintiff.

Counsel concedes this, for he says in his brief: "We make no claim under the oral trust, and we do not claim that the deed to Kistler was fraudulent;" his sole contention being that, although the oral agreement to hold in trust was void when made, yet because, pursuant to it, Probst, with the knowledge and implied consent of Kistler, remained in possession of the premises, and expended considerable money in repairs and betterments, the case is taken out of the statute "making the contract as good as though made in writing," thus invoking, as we understand him, the familiar doctrine of part performance. We regret that counsel has not furnished us more aid in his brief upon what he concedes to be the only point in the case; but it seems to us that the so-called "doctrine of part performance" has no application, and we have found no instarry where it was ever applied to such a case.

It is not a general doctrine of equity, but an invention of the cours to get around the statute, and prevent fraud, not by varying

or contradicting written contracts by parol, but by enforcing oral contracts actually made, but not otherwise enforceable, because not in writing. It is elementary that oral proof cannot be heard to ingraft an express trust on a conveyance absolute in its terms, and we have never heard of a case where it was done under the so-called "doctrine of part performance."

Order reversed.

Vanderburgh, J., absent, took no part.
(Opinion published 54 N. W. Rep. 1063.)

Application for reargument denied May 9, 1893.

OXNARD BROWN vs. JONAS M. KISTLER.

Submitted on briefs April 17, 1893. Decided April 27, 1893.

Appeal by defendant, Jonas M. Kistler, from an order of the District Court of Hennepin County, *Charles M. Pond*, J., entered December 2, 1892, denying his motion for a new trial.

On February 25, 1892, the plaintiff, Oxnard Brown, recovered judgment in the Municipal Court of the City of Minneapolis against George W. Probst for \$16.75 for goods sold him in that month. A transcript of the judgment was filed, and the judgment docketed, in the District Court. A writ of execution was issued and returned unsatisfied. The remaining facts in this action are as stated in *Pillsbury-Washburn Flour-Mile Co. v. Kistler, ante,* p. 123.

Day & Enches, for appellant.

C. E. Conant, for respondent.

MITCHELL, J. This case is ruled by Pillsbury-Washburn Flour-Mills Co. v. Kistler, ante, p. 128, (54 N. W. Rep. 1063.)

Order reversed.

VANDERBURGH, J., absent, took no part. (Opinion published 54 N. W. Rep. 1064.)

Application for reargument denied May 9, 1893.

ST. LOUIS CAR CO. vs. STILLWATER STREET Ry. Co.

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Argued April 13, 1893. Decided April 27, 1898.

Appearance in an Action.

An appearance for any other purpose than to question the jurisdiction of the court is general, and gives the court jurisdiction of the person.

Action to Dissolve a Corporation not Barred by Foreclosure Suit.

A receivership in a suit to foreclose a mortgage on property of a corporation will not prevent another receivership, under 1878 G. S. ch. 76, in proceedings to sequestrate all the property and effects of the corporation for the benefit of all its creditors.

Appeal by plaintiff, the St. Louis Car Company, from an order of the District Court of Washington County, F. M. Crosby, J., made June 24, 1892, denying its motion for the appointment of a receiver of the defendant, the Stillwater Street-Railway Company.

This plaintiff, a foreign corporation, recovered judgment March 25, 1892, against defendant, a domestic corporation, in the District Court of Washington County, for \$925.32. A writ of execution was issued thereon and returned unsatisfied. Thereupon plaintiff commenced this action under 1878 G. S. ch. 76, § 9, to sequestrate the property and effects of the Street-Railway Company, and have a receiver thereof appointed. The plaintiff gave notice to the defendant that on April 11, 1892, it would apply to the court for the appointment of such receiver. On that day defendant presented to the court a notice as follows:

"Now comes C. P. Gregory, and appears specially as attorney for the defendant, the Stillwater Street Railway Company, for a negative purpose only, and for the purposes following, viz.: First. The defendant, the Stillwater Street Railway Company, objects to any further proceedings, or any proceedings in this action looking towards the appointment of a receiver thereof, upon the grounds that there is a receiver already appointed therein, under and by virtue of an order of this court in an action already pending therein.

"Second. Because the plaintiff has never acquired jurisdiction in this action of either the subject-matter, or the person of the defendant, corporation.

C. P. Gregory,

"Attorney for Defendant."



Defendant also submitted affidavits showing that on June 1, 1889. the Street-Railway Company borrowed of Allen Curtis, \$60,000, and mortgaged to him its property, franchise and good will to secure repayment of that sum, fifteen years thereafter, with interest thereon at the rate of six per cent. a year, payable semiannually; that the interest was not paid, and that an action was commenced in the District Court to foreclose the mortgage for default of payment, and that Wm. M. Hewitt was, on February 27, 1892, appointed receiver under 1878 G. S. ch. 66, § 207, to take possession of the mortgaged property, and that he had done so, and was operating the railway as officer of the court, and in the interest of the mortgagee.

The District Court thereupon denied the application of the St. Louis Car Company for a receiver, on the ground that a receiver had already been appointed and the property was in custodia legis.

Searles & Gail, for appellant.

Gregory's appearance called upon the court in the first instance to determine whether the property for which plaintiff sought a receiver was already in custodia legis, and amounted to a general appearance within the rule laid down in Curtis v. Jackson, 23 Minn. 268; Kanne v. Minneapolis & St. L. Ry. Co., 33 Minn. 419; Godfrey v. Valentine, 39 Minn. 336. The receivership in the Curtis suit is no defense to this application. Lowell v. Doe, 44 Minn. 144.

The receiver appointed in the Curtis suit could only administer the mortgaged estate for the benefit of the mortgagee. If there remain any estate in the receiver's hands after he has paid the mortgage debt, it belongs to the corporation. If the Street-Railway Company has wrongfully distributed its assets among its stockholders, or wrongfully disposed of its property before the mortgage was given, the Curtis receiver cannot pursue such property, for as to the corporation the disposition was valid, and the mortgage did not cover it. Such assets must be recovered by a receiver under 1878 G. S. ch. 76. Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37.

J. C. Nethaway, for respondent.

The appearance of Gregory was not of such a character as to confer jurisdiction upon the court to grant the relief prayed for by

plaintiff. Sanderson v. Ohio Cent. R. & C. Co., 61 Wis. 609; Covert v. Clark, 23 Minn. 539; McLean v. Isbell, 44 Mich. 129.

When this application was made, the receiver appointed in the Curtis case had full and absolute control of all respondent's property of every name and nature. If that order is not full enough to satisfy the plaintiff, it had the right to apply to the court, and have the powers of the receiver extended so as to cover anything not covered in the former order. Tennessee v. Edgefield & K. R. Co., 6 Lea, (Tenn.) 353; Mercantile Trust Co. v. Missouri, K. & T. Ry. Co., 41 Fed. R. 8; Central Trust Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. R. 651; Osborn v. Heyer, 2 Paige, 342; Porter v. Kingman, 126 Mass. 141; Robinson v. Atlantic & G. W. Ry. Co., 66 Pa. St. 160; Richards v. People, 81 Ill. 551.

MITCHELL, J. This action was brought by the plaintiff, as judgment creditor, for the appointment of a receiver of the defendant corporation, under the provisions of 1878 G. S. ch. 76.

A receiver had previously been appointed in a foreclosure suit brought by one Curtis against the same defendant.

The plaintiff having made a motion in the present action, the defendant appeared by attorney, the appearance being stated to be special, and objected to "any further proceedings, or any proceedings, in the action looking towards the appointment of a receiver thereof," upon the grounds—First, that "there is a receiver already appointed therein, under and by virtue of an order of this court in an action already pending therein;" second, because the plaintiff has never acquired "jurisdiction in this action of either subject-matter or of the person of the defendant corporation."

Giving counsel the benefit of the assumption that by "plaintiff" is meant "court," we still think that this amounted to a general appearance, which gave the court jurisdiction of the defendant. The rule is that an appearance for any other purpose than to question the jurisdiction of the court is general.

The first ground of objection to plaintiff's application for the appointment of a receiver did not go to the jurisdiction of the court, either over the subject-matter or over the person of the defendant,

and did not purport to be made as such, but merely as a defense on the merits to plaintiff's motion, to wit, that a receiver had been already appointed in another action.

2. The fact that a receiver had already been appointed in the foreclosure suit constituted no reason why a receiver should not be appointed under 1878 G. S. ch. 76.

A receivership in a suit to foreclose a mortgage is only for the purposes of the foreclosure, and, however general the language of the appointment, affects only the property covered by the mortgage. Its purpose is to preserve the mortgaged property for the benefit of the mortgagee. Lowell v. Doe, 44 Minn. 144, (46 N. W. Rep. 297.)

On the other hand, the object of a receivership of an insolvent corporation under 1878 G. S. ch. 76, is to sequestrate all its property for the benefit of all its creditors.

The powers of the receivers in the two cases are entirely different. There are various classes of property that can be reached by a receiver under chapter 76 which could not be reached by a receiver appointed in a foreclosure suit. The former has substantially all the powers and functions of an assignee in bankruptcy. Everything becomes assets in his hands which are assets as to creditors, although not assets as to the corporation, as, for example, property conveyed in fraud of creditors, capital withdrawn without provision for the payment of corporate debts, the personal liability of stockholders, etc. Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, (46 N. W. Rep. 310.)

Of course, an appointment of a receiver under 1878 G. S. ch. 76, would not necessarily supersede the receivership in the foreclosure suit. If the court should be of the opinion that the interests of the mortgagee could not be otherwise properly protected, both receiverships might coexist; that under chapter 76 being subordinate, as to the property covered by the mortgage, to the receivership in the foreclosure suit.

And as it would be eminently desirable, if possible, that the entire property should be under the control of one officer of the court, there would be nothing improper in the court appointing the same person receiver in both cases, provided there is no conflict of interest between the mortgagee and the other creditors of the defendant.

But these are matters for the consideration of the District Court. Order reversed, and cause remanded for further proceedings.

Vanderburgh, J., absent, took no part. (Opinion published 54 N. W. Rep. 1064.)

G. W. Allen vs. Nils Swenson et al.

Submitted on briefs April 4, 1893. Decided April 27, 1898.

An Answer Construed.

Hcld, that the answer set up a good defense, and consequently that it was error to order judgment for the plaintiff on the pleadings.

Appeal by defendants, Nils Swenson and five others, from a judgment of the District Court of Polk County, Ira B. Mills, J., entered July 2, 1892, upon the pleadings for \$404.22. The action was upon a promissory note. The trial court held that the answer stated no defense, and gave judgment for plaintiff for the amount claimed.

William Watts, for appellants.

A. C. Wilkinson, for respondent.

MITCHELL, J. The allegations of the answer are insufficient to entitle the defendant to any reformation of the written contract. It is merely alleged that the plaintiff stated to the defendants that the horse referred to "had been imported from Scotland, and was registered in Scotland," but it is not alleged that this statement was made as a warranty, or that it formed, or was intended to form, a part of the contract of the parties, nor does it appear that it was material to the transaction. But it does appear from the answer, and the written contract attached, that the note sued on was given for part of the purchase price of a horse sold and delivered by plaintiff to defendant; that as part of the same transaction, and as part consideration for the note, the plaintiff guarantied that the horse was named "Pride of Huron," and numbered 2,397, and was a full Clydesdale horse, and registered, and that he would furnish defendants a certificate of registration within ninety days; otherwise, the note to be void, and returned to them. The note was, by its express terms, conditioned upon a full pedigree of the horse being furnished within the time stipulated. The answer further alleges that the horse was not numbered 2,397 in the book of registration, and that plaintiff has never furnished the defendants any certificate of registration, by reason whereof they have sustained damage, etc.

Without determining whether the warranty as to the number of the horse was material, the covenant or promissory warranty to furnish the defendants with a certificate of registration as evidence that the horse was, as warranted, (a full Clydesdale, with a registered pedigree,) certainly was material. This certificate the plaintiff, according to the answer, never had furnished, and by the terms of the contract the payment of the note was conditioned upon such a certificate being furnished. To order judgment for plaintiff on the pleadings was therefore error.

There is nothing in the point that defendants should have rescinded the contract, and returned the horse, within a reasonable time after plaintiff's failure to furnish the certificate, and that by their failure to do so they had waived plaintiff's default, and elected to accept the horse without a pedigree as performance of the contract. They were not put to any such election. They had a right to retain the property, and stand on the contract.

Judgment reversed.

Vanderburgh, J., absent, took no part.

(Opinion published 54 N. W. Rep. 1065.)

STATE ex rel. THOMAS O'CONNOR vs. HENRY WOLFER, Warden.

Argued April 6, 1893. Decided April 27, 1893.

Recommitment of a Convict Conditionally Pardoned.

A convict who has received and accepted a conditional pardon cannot be arrested and remanded to suffer his original sentence because of an alleged nonperformance of the condition, upon the mere order of the governor. He is entitled to a hearing before the court in which he was convicted, (or some superior court of criminal jurisdiction,) and an opportunity to show that he has performed the condition of his pardon, or that he has a legal excuse for not having done so.

Same—Trial by Jury.

On such hearing the court may, in its discretion, if in doubt as to the facts, take the verdict of a jury, but the party is not entitled to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted, if he pleads that he is not.

Original petition of Thomas O'Connor made February 18, 1893, for a writ of *Habeas Corpus* directed to Henry Wolfer, Warden of the State Prison at Stillwater, to have the body of the petitioner. together with the authority for his imprisonment before this court, to do and receive what shall be considered in the premises.

The petitioner was on December 2, 1880, convicted in the District Court of Le Sueur County of the crime of murder in the first degree, and sentenced to be imprisoned in the State Prison at Stillwater during the term of his natural life. A commitment was on the same day issued, and he was conveyed to said prison and there confined. On October 1, 1890, William R. Merriam, then Governor of this State, upon the petition of the Judge, prosecuting attorney, and nine of the jury, and a large number of the citizens of that county, granted a full pardon to the petitioner, upon the condition therein expressed that he take up his residence outside the State, and maintain the same outside the State during the balance of his life; otherwise the pardon to become null and void and be held for naught.

On the next day the petitioner was released, and he went immediately to St. Paul, and by telegram notified his wife, at Madison Lake, in Blue Earth county, of his pardon, and directed her to dispose of his farm and personal property, and meet him at St. Paul, and go with him to Detroit, Michigan. She sold the property, and

on October 10, 1890, started for St. Paul to meet him, but, as she was about to take the train, she was stricken with paralysis. He was notified of this fact by telegram and went to her, procured a physician and medicine, and then concealed himself in the vicinity to avoid the public, until he could take a train to leave the State. On Monday morning, October 13, 1890, as he was going to the station to take the train, he was arrested without warrant, and conveyed to the county jail of Le Sueur county, and there kept in confinement until October 16, 1890. On that day the Governor issued his warrant to the said Warden reciting the conviction and conditional pardon of the petitioner, and stating that he had not left the State, and was then in the custody of the Sheriff of Le Sueur county, and declaring the pardon to be null and void, and directing the Warden to retake the petitioner wherever he might be found, and return him to the State Prison, and there detain him in custody, to be dealt with in accordance with the terms of his original sentence and commitment.

Under this warrant the petitioner was again taken to the State Prison, and there confined. On January 13, 1893, he presented his petition to Hon. W. C. Williston, one of the Judges of the District Court of Washington County, setting forth these facts, and praying for a writ of Habeas Corpus. The writ was granted, and he was taken before the Judge, and proofs were submitted. On February 13, 1893, that Judge made his decision remanding the petitioner to the custody of the Warden. On February 18, 1893, petition was presented to this court, setting forth these facts, and praying that a writ of Habeas Corpus issue. The application was ordered to be heard on April 6, 1893, before this court.

H. H. Gillen and J. C. Nethaway, for petitioner.

There are but two questions involved in this application: First. Had the conditions of the pardon been violated at the time the petitioner was apprehended? Second. Being a conditional pardon, had the Governor or authorities the right to recommit the petitioner to the custody of the Warden of the prison without giving him a trial or hearing before the court that sentenced him, or a court of superior jurisdiction, that he might have an opportunity to show that the conditions of his pardon had not been violated?

Sickness is an excuse for not complying with the conditions of the pardon. Rex v. Thorpe, 1 Leach, (4th Ed.) 396, and note; State v. Smith, 1 Bailey's L. 283. As to the second question—Millers' Case, 1 Leach, 74; Madan's Case, 1 Leach, 223; Aickles' Case, 1 Leach, 303; Sir Walter Rawleigh's Case, Cro. Jac. 495; Ratcliffe Case, Foster, 40; Rex v. Rogers, 3 Bur. 1810; State v. Addington, 2 Bailey, 516; State v. Fuller, 1 McCord, 178; State v. Chancellor, 1 Strobh. 347; State v. Barns, 32 S. C. 14; People v. Potter, 1 Park. Cr. Rep. 47; People v. James, 2 Cai. 57.

A convict, having received a conditional pardon, cannot be recommitted without a hearing in a court of competent jurisdiction, as to whether he had violated the conditions of his pardon. People v. Moore, 62 Mich. 496; People v. Cummings, 88 Mich. 249. Blackstone gives a form of petition to the court to remand after release from original sentence. 2 Cooley's Blackstone, appendix; 1 Bishop, Crim. Pro. §§ 1383-1384. On careful examination the following cases will be found not in conflict: Ex parte Marks, 64 Cal. 29; Arthur v. Craig, 48 Iowa, 264; Kennedy's Case, 135 Mass. 48.

H. W. Childs, Attorney General for the State.

The Governor may annex to a pardon any condition, whether subsequent or precedent, not forbidden by law. And it lies upon the grantee to perform the condition. If the condition is not performed, the original sentence remains in full vigor and may be carried into effect. Cole's Case, Moore, 466; State v. Smith, 1 Bailey, 283; Addington's Case, 2 Id. 516; People v. Potter, 1 Park. Cr. Rep. 47; United States v. Wilson, 7 Pet. 150; In re Greathouse, 4 Saw. 489; State v. Chancellor, 1 Strobh. 347.

The proper steps have been taken to enforce the original sentence. It is admitted that the prisoner is the same person, and it is further admitted that, though pardoned and released on the 1st of October, 1890, he was still in the State on the 13th day of October, 1890.

MITCHELL, J. As the respondent traversed none of relator's allegations of fact, the petition for the writ must, for the purposes of this hearing, be taken as true. Therefore no statement of facts other than a reference to this petition is necessary.

That the pardon granted to relator was conditional, and that the condition was a valid one, cannot admit of doubt. The power to grant conditional pardons is conceded. The statute, 1878 G. S. ch. 119, which is but declaratory of the common law, expressly so provides.

A pardon being wholly a matter of mercy, the governor may impose any condition that he pleases, at least provided it is neither immoral, impossible, nor illegal. The condition in this case, to wit, that the prisoner "take up his residence out of the state, and maintain the same outside of the state during the balance of his life," was neither immoral, impossible, nor illegal. The fact that this condition precedes the operative part of the pardon, which, if taken by itself, would be unconditional, is unimportant. Taking the whole instrument together, it is perfectly evident that the intention was that the pardon should be subject to this condition.

It appears that about a week after the pardon had been issued, and the relator discharged, the governor, without giving him any opportunity to be heard, issued his order to the warden of the penitentiary by which, after assuming to recite the condition of the pardon and the nonperformance of it by the relator, he declared the pardon null and void, and directed the warden to arrest the relator, and return him to the state prison, to be there kept in confinement, in accordance with the judgment of the court before which he had been convicted; that upon the authority of this order alone the relator was shortly afterwards arrested, and without any trial or hearing in court or otherwise, and without being given any opportunity to be heard as to whether he had violated the conditions of his pardon, was returned to the state prison, where he is still confined.

The main question, and the one which presents itself at the threshold of this case, is whether a person who has been discharged on a conditional pardon can be recommitted to the state prison without any hearing or adjudication, upon the mere order of the governor, who has assumed to determine ex parte that the condition of the pardon has not been performed. It seems to us that such a course is warranted neither by law nor by a just regard for the personal liberty of the citizen. It is, of course, well settled that if a person be pardoned upon a condition, either precedent or subsequent, which he neglects to

perform, the pardon is void, and he may be remanded to suffer his original sentence; but upon the question whether he has neglected to perform the condition, and is therefore liable to be thus remanded, he is entitled to a hearing and adjudication. As a pardon is wholly a matter of mercy, we are not prepared to hold that the legislature may not provide that in case of a conditional pardon the governor may, even without giving the person an opportunity to be heard, determine whether the condition has been violated, and, if he determines that it has, remand him to the state prison; and it may be that, even in the absence of any statute, the governor would have the right to insert such a provision or condition in the pardon itself, for it might well be argued that the statute in the one case, and the express provision of the instrument itself in the other, constituted a condition to which the prisoner voluntarily subjected himself by the acceptance of the pardon. See Kennedy's Case, 135 Mass. 48, and Arthur v. Craig, 48 Iowa, 264.

But the pardon in this case contained no such condition, and our statute is entirely silent as to the mode of procedure. cedure, therefore, in such cases, is governed by the rules of the common law. We have carefully examined all the cases within our reach, both English and American, and find that, except where otherwise provided by statute, (as in Massachusetts,) the uniform practice from the earliest date has been that, upon complaint that the person has not performed the condition of his pardon, a warrant is issued, upon which he is arrested, and committed to jail until he can be brought before the court for a hearing; that thereupon an order, rule, or some such process, (the precise form of which is not very material,) issued by the court in which he was convicted, (or some superior court of criminal jurisdiction,) he is brought before the court to show cause why execution should not be awarded against him on his original sentence. The record of his conviction is then produced. The first thing is that it must appear that he is the same person. If he pleads that he is not, a venire to try that fact is awarded. If the jury find, or if he confess, that he is the same person, then there may be other questions, (according to the nature of the condition of the pardon,) for the consideration of the court, as, for example, in this case, whether the prisoner had had a reasonable time within which to remove from — the state, or whether he had been necessarily delayed in doing so by reason of the sickness of his wife. On all such and similar matters touching the question whether he had failed to perform the condition of his pardon the prisoner is entitled to be heard, just as he was entitled to be heard why sentence should not be passed on him when he was originally brought before the bar of the court for sentence after verdict. It is competent for the prisoner in such cases to present any facts constituting an excuse for nonperformance of the strict terms of the condition, as, for example, extreme poverty or sickness; and, if the court is of the opinion that such impediments amount to a lawful excuse, he should be discharged. Aickles' Case, 1 Leach, Cr. Cas. 390; Thorpe's Case, Id. 396, note. If the court is in doubt in regard to the facts which rest in pais, it has been sometimes the practice to take the verdict of a jury. This was done in Thorpe's Case, supra. But, while we have no doubt of the right of the court to do this, we are of opinion that the prisoner is not entitled to the verdict of the jury as a matter According to the course of common-law practice the only of right. issue that must be tried by a jury is whether the prisoner is the same person who was convicted. The reason for this is that otherwise a person might be remanded to suffer punishment who has never been tried by a jury. But, if it be found or admitted that the prisoner is the same person, no other or greater formalities are required in reiterating the sentence, and returning him to imprisonment under it, than were required when he was brought up for original sentence.

The contention of relator's counsel, based principally upon the authority of People v. Moore, 62 Mich. 496, (29 N. W. Rep. 80,)—that a pardoned convict, charged with having violated the conditions of his pardon, must be arrested and tried in the same manner—that is, upon an indictment and by a jury—as other offenders against the law, is, in our judgment, not only contrary to the course of the common law from the earliest times, but proceeds upon an entirely erroneous theory as to the status of a person released upon a conditional pardon, and as to the nature of proceedings to remand him to imprisonment upon nonperformance of its conditions. If the violation of the conditions was a crime, as it is in certain cases in some jurisdictions, and if the person was

charged with that crime, of course he would have to be tried in the same manner as those charged with any other offense; and, if a second or new conviction of the original offense was necessary, the same thing would be true. But the nonperformance of the condition of a pardon is not an offense. Neither is there any second trial and conviction of the prisoner for the original offense. He had been already tried and convicted of the crime of which he was conditionally pardoned, and, if he violates the condition, the pardon is altogether void, and he is remanded to suffer his original, and not a new, sentence for the crime (and not some other) of which he had been already convicted. Without multiplying authorities we merely refer, in support of our views, to People v. Potter, 1 Parker, Crim. R. 47, where the earlier cases, both English and American, are quite extensively cited and commented upon.

Counsel, however, makes the point that upon relator's own showing in his petition he had violated the condition of his pardon, and therefore, even if the means by which he was returned to the state prison were unlawful, still he ought to be remanded to the custody of the warden.

We are not prepared to say that, where a person who has been thus returned to prison in an illegal manner sues out a writ of habeas corpus before a court of competent original criminal jurisdiction, such court may not, on the return to the writ, hear and determine the question whether the condition of the pardon had been performed, and, if the fact be adjudicated adversely to the prisoner, remand him to suffer his original sentence.

But this is not a court of original criminal jurisdiction, and will not enter into the consideration of any such questions, but will merely inquire whether the relator's present detention is by authority of law, and, if it is not, order his discharge. Of course, such discharge is no bar to the institution of further proceedings in behalf of the state in the proper court, in the manner already indicated, to have the party remanded to prison. We will also add that we do not think that it necessarily follows, by any means, from the allegations of relator's petition, that he had failed to perform the condition of his pardon. The governor's order recites that the condition was that he should immediately leave the state. This is incorrect. It was that he should "take up his residence

out of the state," etc. No time being specified, he had what would be, under all the circumstances, a reasonable time. We do not care to enter into any extended discussion of the facts, but we suggest that it appears that he had a family in a distant part of the state; also that one of the expressed reasons for granting the pardon was that he might care for his family, who, it must have been expected, would either accompany or shortly follow him to his new residence; also that he had some property to be disposed of; further, that while he and his family were preparing to leave the state, and were about ready to start, his wife was suddenly taken dangerously ill, which further delayed his intended departure. In view of all these facts it is at least an open question whether more than a reasonable time for leaving the state had elapsed, and if so, whether he had a lawful excuse for not leaving sooner.

It is ordered that the relator be discharged from custody.

Vanderburgh, J., absent, took no part.

(Opinion published 54 N. W. Rep. 1065.)

STATE OF MINNESOTA vs. M. E. WOODLING.

Argued April 11, 1895. Decided April 27, 1898.

53 142 53 420

Waiving Jury in a Trial for Misdemeanor.

The defendant in a criminal case in the municipal court of Minneapolis (which has jurisdiction only of offenses cognizable before a justice of the peace) may waive a jury, and consent to trial by the court.

Findings Justified by Evidence.

Evidence held sufficient to justify the finding.

Appeal by defendant, M. E. Woodling, from a judgment of the Municipal Court of the City of Minneapolis, Stephen Mahoney, J., entered November 3, 1892, convicting him of assault and battery upon Fred E. Harlow. See State v. Bannock, post, p. 419.

S. M. Finch, for appellant.

Wherever the right of trial by jury could be had under the Territorial law, it may now be had, and the legislature cannot abridge

it. Wallon v. Bancroft, 4 Minn. 109, (Gil. 70;) Commissioners v. Morrison, 22 Minn. 178.

Where rights are acquired by the citizen under the existing laws, there is no power in the Legislature to take them away. Wynehamer v. People, 13 N. Y. 378; Taylor v. Porter, 4 Hill, 140; Beaupre v. Hoerr, 13 Minn. 366, (Gil. 339;) Baker v. Kelley, 11 Minn. 496, (Gil. 358.)

The distinction between the case of State v. Sackett, 39 Minn. 69, and the one at bar is, that the court there held that the accused might be tried by his consent by a jury of less than twelve. The majority opinion in State v. Carman, 63 Iowa, 130, holds that a defendant in a criminal action cannot waive his right to a jury trial.

Henry W. Childs, Attorney General, and D. F. Simpson and M. D. Purdy, for the State.

There can be no constitutional question about the right of the Legislature in this State to prescribe by statute that a jury trial may be waived by the parties in all cases. Const. art. 1, § 4; In re Staff, 63 Wis. 285; State v. West, 42 Minn. 147.

It is unnecessary to go into any discussion of the distinction which the courts make, between felonies and misdemeanors. State v. Sackett, 39 Minn. 69; State v. Robinson, 43 La. Ann. 383. The defendant may consent to waive the right to have a jury trial. Moore v. State, 22 Tex. App. 117; State v. Cottrill, 31 W. Va. 162; State v. Potter, 16 Kan. 80; Murphy v. State, 97 Ind. 579; Dillingham v. State, 5 Ohio St. 280; 1 Am. Crim. Law Mag. 193.

MITCHELL, J. The defendant, having been arraigned before the municipal court of Minneapolis upon a complaint for assault and battery, pleaded not guilty, and expressly waived a jury, and thereupon the court, having tried the case, found the defendant guilty, and ordered that he pay a fine of \$25.

The defendant on appeal raises two points: First, that the judgment was not justified by the evidence; and, second, that the court had no jurisdiction to render judgment without the verdict of a jury.

- 1. All we deem necessary to say upon the first point is that, even upon defendant's own testimony, he was guilty of an assault and battery. As the battery was not serious, and as the provocation from the indecent conduct of the complaining witness was great, we would have been better satisfied if the court had imposed a lighter fine; but this furnishes no ground for a reversal.
- 2. As to what constitutional rights may be waived by defendants in criminal cases, and particularly whether they can waive the right of trial by jury, is a subject upon which much has been written, and upon which there is much difference of opinion.

Without going into any general discussion of the subject, we may say that it seems to us that perhaps the true criterion is whether the right is a privilege intended merely for the benefit of the defendant, or whether it is one which also affects the public, or goes to the jurisdiction of the court. If it belongs to the first class, we see no good reason why the accused may not waive it; but, if it belongs to the latter, it would seem that no consent on his part could amount to a valid waiver. And the different views entertained as to the nature and object of constitutional provisions relating to the right of trial by jury in criminal cases will probably account for the conflict of decisions as to whether it can be waived.

Those who construe the right as a matter in which the public has no interest, and which is not jurisdictional, but designed solely for the protection of the defendant, naturally hold that it may be waived; while those who take the view that it affects the public as well as the defendant, or that it relates to the constitution of the court, of which it is intended to make the jury an essential part, as naturally hold that it cannot be waived. If our constitution provided, as did the original constitution of the United States, (article 3, § 2,) that "the trial of all crimes (except in cases of impeachment) shall be by jury," there would be good grounds for arguing that a jury was intended to be an essential part of a constitutional tribunal for the trial of crimes, without which it would not be legally constituted, any more than it would be without a judge. But our constitution contains Its language is, (article 1, § 6:) "In all criminal no such provision. prosecutions the accused shall enjoy the right to a speedy and public

trial by an impartial jury," etc. This language imports merely a grant or guaranty of a right to the accused for his own protection, and seems to us never to have been intended to prescribe the organization of the court, or to make a jury an essential part of it. be so, it necessarily follows that the presence or absence of a jury is not a jurisdictional matter,—that is, it does not go to the constitutional organization of the court,—and that, if the defendant cannot waive a jury trial, it must be purely upon grounds of public policy, and because the public have such an interest in the life and liberty of the citizen that he ought not to be allowed to waive this safeguard which the constitution has thrown around him. right is intended merely for his protection, it is difficult to see why on principle he may not waive it, or why any distinction in that regard should be made between the right to a jury trial and various other rights which it is uniformly held that he can waive. also difficult to perceive the distinction sometimes made in this respect between misdemeanors and felonies, unless it be founded on considerations of public policy growing out of the greater severity of punishment in case of the latter. The logic of both the decision and the reasoning in State v. Sackett, 39 Minn. 69, (38 N. W. Rep. 773.) would tend strongly to the conclusion that the accused, irrespective of any statute authorizing it, might waive a jury in any criminal case; for a "jury," within the meaning of the constitution, imports a body of twelve men. State v. Everett, 14 Minn. 439, (Gil. 330.) But we are not at present prepared, neither is it necessary in this case, to go that far. As already suggested, if the accused cannot waive a jury, his inability to do so must rest wholly upon some supposed consideration of public policy. The constitution contains no provision forbidding him to do so, or prohibiting the legislature from permitting it to be done. On many matters, what is and what is not in accordance with public policy is largely within the discretion of the legislature. In fact, public policy is largely the creation of the legislature. In the absence of any constitutional prohibition, we fail to see why a declaration of legislative views as to the policy of permitting the accused to waive a jury trial is not decisive of the matter. Now, from the earliest territorial days, long antedating the adoption of the constitution, we had, and still have, a statute authorizing, or at least recognizv.53 M.-10

ing, the right of defendants accused of any offense cognizable by justices of the peace to waive a jury, and submit to trial by the Rev. St. 1851, ch. 69, art. 4, § 172; 1878 G. S. ch. 65, § court. So far as we are aware, these statutes have been uniformly acted upon, and their validity never called in question. clusively shows that, in the view of the legislature, it is expedient and in accordance with public policy to permit a jury to be waived in the case of all those petty offenses which are triable by justices; and this is the view taken in most, if not all, other jurisdictions. When the legislature created the municipal court of Minneapolis, it provided that "it should have exclusive jurisdiction to hear all complaints, and conduct all examinations and trials, in criminal cases arising or triable within the city of Minneapolis heretofore cognizable before a justice of the peace." Sp. Laws 1889, ch. 34, In other words, the municipal court took the place of justices of the peace, its criminal jurisdiction being the same, and not greater. The act creating the court does not in terms provide for the waiver of a jury trial by the defendant, as in justice's court, but it seems to us that this is necessarily implied. is no reason why, if it was policy to permit defendants to do so in justice's court, it was not equally so to permit it in the same class of cases before the municipal court. It is urged that the fact that a defendant has a right of appeal from a justice to the district court where he may have a trial de novo, before a jury, while no such right of appeal is given from the municipal court, (the appeal from the latter being directly to the supreme court,) renders the statute relating to the waiver of a jury in justice's court inapplicable to the municipal court.

If the statute assumed to deny the defendant the right to a jury in justice's court, there would be some force in this suggestion. But it does nothing of the kind; it merely authorizes him to waive the right if he sees fit to do so. We cannot see how the difference in the right of appeal (which is a purely statutory right) has any bearing on the question. Our conclusion therefore is that a defendant may waive a jury in the municipal court the same as in justice's court.

See In re Staff, 63 Wis. 285, (23 N. W. Rep. 587,) in which it is evident that the court, but for its regard for the rule of stare

decisis, would have gone still further, and held that no legislative sanction whatever was necessary to permit the defendant to waive a jury trial in such cases.

Judgment affirmed.

Vanderburgh, J., absent, took no part. (Opinion published 54 N. W. Rep. 1068.)

STATE ex rel. H. W. CHILDS, Attorney General, vs. Joseph L. Kiichli.

53 147 73 534 53 147 819LRA 779 52LRA406n

Argued April 20, 1898. Decided April 27, 1898.

Removal from Office.

The president of the city council of the city of Minneapolis is not an "officer" of the city, within the meaning of either the city charter or article 13, § 2, of the constitution, but merely an officer or servant of the city council which elected him, and as such, according to the rules of parliamentary law, is removable at the will or pleasure of that body.

The Attorney General presented to the Chief Justice of this court on March 24, 1893, an information, and an order was made that a writ of *Quo Warranto* issue, returnable before the court on April 4th, then next, requiring Joseph L. Kiichli to then and there show by what warrant he intruded into, held and exercised the office of President of the City Council of the City of Minneapolis.

The writ was issued and served and the respondent made answer that Alderman Henry W. Brazie was on January 2, 1893, elected president of the council, and acted as such until March 10, 1893. On that day at a regular meeting of the council the office of President of the City Council was declared vacant, and Brazie ceased to act. That respondent was then duly elected President, and has since acted by virtue of such election.

Henry W. Childs, Atty. Genl., D. F. Morgan, and W. E. Hale, for relator.

The relator contends that the Common Council of the City of Minneapolis has no power to remove its duly elected, and acting president, upon the mere volition of a majority of the members, without any charge against him of malfeasance or nonfeasance in the performance of his duties. That the President of the City Council is a public officer; that he holds for a definite term; that under the Constitution, art. 13, § 2, the authority of the Legislature to provide for the removal from office of a public officer, holding for a definite term, is limited to cases of malfeasance or nonfeasance in the performance of his duties; and that the Charter of Minneapolis confers no power upon the City Council to remove, without cause, an officer holding for a term fixed by law.

The President of the City Council is a public officer. People ex rel. v. Common Council, 77 N. Y. 503; Bradford v. Justices, 33 Ga. 336; Clark v. Stanley, 66 N. C. 63; State ex rel. v. Anderson, 45 Ohio St. 196.

Under the Constitution, art. 13, § 2, the authority of the Legislature to provide for the removal from office of a public officer holding for a definite term, is limited to cases of malfeasance or nonfeasance in the performance of his duties. State cx rel. v. Peterson, 50 Minn. 239; Andrews v. King, 77 Me. 224; Farrell v. Bridgeport, 45 Conn. 191; Cobb v. Portland, 55 Me. 381; Lowe v. Commonwealth, 3 Met. (Ky.) 237; Brown v. Grover, 6 Bush, 1.

It is only where the Constitution is silent as to the mode and cause of removal of the officer that the Legislature has full control of the whole subject. Ex parte Wiley, 54 Ala. 226.

If an office is created and the term fixed by the Constitution, which also declares for what causes and in what mode, an incumbent of it may be removed, before the expiration of his term, neither the Legislature nor the Executive can remove or suspend, for any reason, or in any other mode, than that provided. Page v. Hardin, 8 B. Mon. 648; Commonwealth v. Gamble, 62 Pa. St. 343; State v. Draper, 50 Mo. 353; State v. Thoman, 10 Kan. 191; State v. McNeely, 24 La. An. 19.

The President of the Council is an inferior officer and within this section of the Constitution. People v. Comptroller, 20 Wond. 595; Bergen v. Powell, 94 N. Y. 591; People v. Hill, 7 Cal. 97; Smith v. Brown, 59 Cal. 672; Houseman v. Commonwealth, 100 Pa. St. 222. The Charter confers no power upon the City Council to

remove its President without cause. Page v. Hardin, 8 B. Mon. 648; State v. Chatburn, 63 Iowa, 659; State v. Pritchard, 36 N. J. Law, 101; People ex rel. v. Nichols, 79 N. Y. 582; State ex rel. v. Smith, 35 Neb. 13.

The doctrine that an officer may be removed at pleasure has grown up in the American courts. At common law, an officer could be removed only for cause and after a hearing. Metevier v. Therrien, 80 Mich. 187; Ex parte Ramshay, 18 Q. B. 173; Queen v. Archbishop of Canterbury, 1 El. & El. 545.

The arbitrary power of removal is not conferred upon the council by the charter, either in terms or by necessary implication. Hall-gren v. Campbell, 82 Mich. 255.

Brooks & Hendrix, for respondent.

It is usual and proper to remove such officer by a motion which declares the office vacant. And it is common knowledge that when a motion concerns the presiding officer, it is properly put to the assembly by the person by whom the motion is made. If the office becomes vacant, the previous incumbent is necessarily removed. The like result is obtained by the election or appointment of a successor. People v. Carrique, 2 Hill, 93; Pepis' Case, 1 Vent. 342; Ex parte Hennen, 13 Pet. 230; Williams v. Gloucester, 148 Mass. 256; Blake v. United States, 103 U. S. 227.

The constitutional restriction upon legislative power in the use of the words "inferior officers" has no reference to the office in controversy. Among the cases cited by relator Houseman v. Commonwealth, 100 Pa. St. 222, is the only one where the question seems to have received any particular attention. In People v. Comptroller, 20 Wend. 595, the court was "inclined to think" that the commissioners were officers, but the point was unncessary to the determination of the case. And in each of the cases of Bergen v. Powell, 94 N. Y. 591; People v. Hill, 7 Cal. 97, and Smith v. Brown, 59 Cal. 672, the point was apparently taken for granted without discussion. Constitutional limitations upon the power of the Legislature in respect to officers, will be confined to those offices which are specially enumerated in the Constitution, unless the contrary expressly appears therefrom. State v. Seavey, 22 Neb. 454; Doug-

las County v. Timme, 32 Neb. 272; People v. Provines, 34 Cal. 520; State v. Kirk, 44 Ind. 401; Mohan v. Jackson, 52 Id. 599; Res publica v. Dallas, 3 Yeates, 300; State v. Somnier, 33 La. An. 237; Robinson v. White, 26 Ark. 139; State ex rel. v. Kalb, 50 Wis. 178.

When an office is created by statute, it is entirely within the control of the legislature. People v. Haskell, 5 Cal. 357; People v. Banvard, 27 Id. 470; Evans v. Populus, 22 La. An. 121; Farwell v. Rockland, 62 Me. 296; Prince v. Skillin, 71 Id. 361; Taft v. Adams, 3 Gray, 126; Commonwealth v. Bacon, 6 Serg. & R. 322; Barker v. Pittsburgh, 4 Barr, 49; Conner v. Mayor, etc., of New York, 2 Sandf. 355, 5 N. Y. 285; Augusta v. Sweeney, 44 Ga. 463; Robinson v. White, 26 Ark. 139; Butler v. Pennsylvania, 10 How. 402; Commissioners of Hennepin County v. Jones, 18 Minn. 199, (Gil. 182.)

It is the law almost universally recognized in this country that in the absence of restrictive provisions of law, "the power of removal is incident to the power of appointment;" and in such case, removal is permissible at the pleasure of the appointing power, and without notice or hearing. Avery v. Tyringham, 3 Mass. 160; Ex parte Hennen, 13 Pet. 230; Commonwealth v. Sutherland, 3 Serg. & R. 145; Laimbeer v. Mayor, 4 Sandf. 109; People v. Mayor of New York, 5 Barb. 43; People ex rel. v. Fire Commissioners, 73 N. Y. 437; Newsom v. Cocke, 44 Miss. 352; People v. Higgins, 15 Ill. 110; State v. Alt, 26 Mo. App. 673; Patton v. Vaughan, 39 Ark. 211; People v. Hill, 7 Cal. 97.

There are other cases in which the term prescribed was coupled with a provision whereby the appointing power could remove the officer prior to the expiration of his term. State v. McGarry, 21 Wis. 496; People ex rel. v. Whitelock, 92 N. Y. 191; Sweeney v. Stevens, 46 N. J. Law, 344; State v. Somers, 35 Neb. 322; Eckloff v. District of Columbia, 135 U. S. 240.

But the President of the City Council is an officer wholly different from the executive and administrative officers authorized to be appointed by the City Council. He is essentially a legislative officer, i. e. an officer of a legislative body, and as such by common law and parliamentary usage, as well as under the charter, is removable at the will and pleasure of that body. The City Council is a local legislative body. It resembles the Legislature of an independent state, acting under a constitution prescribing its powers." Denning v. Roome, 6 Wend. 651; Wetmore v. Story, 22 Barb. 414; Cochran v. McCleary, 22 Iowa, 75.

The President of the City Council of Minneapolis has in fact but little power and few privileges. He appoints no committee, unless authorized to do so by the Council itself. He receives no emoluments or compensation for his services as such. casting vote in case of a tie. He can vote once in his capacity of alderman, but has no additional vote as president. ex officio a member of any board. Nor is there any statute whereby the President of the City Council is required, or authorized to authenticate any ordinance, resolution or record. If it be his duty to do this, it is because the duty is imposed by parliamentary law. And aside from the fact that in a certain contingency he may by the terms of the statute become acting Mayor, this officer has no franchise or privilege additional to that of the other members of the Council, except only the right to preside at its meetings. mere presiding officer is but the servant of the house, to declare its will and to obey implicitly all its commands. 2 Bentham's Political Tactics, 347; Cushing's Manual, 293, 493; 5 Hume's History of England, 208; In re Speakership, 15 Col. 520.

Brazie had lost the confidence of a majority of the Council. The vote taken was notice sufficient. And there was nothing revolutionary in this proceeding. On the contrary, it was in accordance with precedent and the well recognized rules of parliamentary law. And it was essential to an efficient and orderly administration of municipal affairs. *Madison* v. *Korbly*, 32 Ind. 78.

MITCHELL, J. This is a proceeding in the nature of quo warranto, requiring the respondent "to show cause by what warrant he holds and exercises the office of president of the city council of Minneapolis."

It appears that on January 2, 1893, the city council duly elected Henry W. Brazie, one of their members, president of their body; that Brazie entered upon his duties as such, and continued in their exercise until March 10th, when the city council, by resolution,

declared the office vacant, and then elected the respondent. contentions of the relator are that (1) the "presidency of the city council" is a "public office," and its incumbent a "public officer," within the meaning of both the city charter and Art. 13, § 2, of the constitution of the state. (2) Such officer holds his office for a definite term, under the provisions of chapter 2, § 1, of the city charter, which provides that all officers appointed by the council shall, unless otherwise provided, hold their respective offices for the term of two years, etc. (3) The city charter, ch. 4, § 4, confers no power on the city council to remove an officer for a term fixed by law except for cause, after a hearing and an opportunity to (4) But, if it does, it is invalid, for the reason that under be heard. Article 13, § 2, of the constitution, the authority of the legislature to provide for the removal of public officers holding for a definite term is limited to cases of malfeasance or nonfeasance in office.

While counsel have argued all these propositions ably and exhaustively, the conclusion at which we have arrived renders it unnecessary to consider any but the first.

The city charter provides that the city council shall consist of a certain number of aldermen, to be elected in each ward.

It enumerates the elective officers of the city, and provides that all other officers necessary for the proper management of the affairs of the city shall be appointed by the city council, unless the charter otherwise provide. It then proceeds to provide specifically for numerous appointive, executive, and administrative officers, among whom "President of the city council" is not named.

The only provisions in the charter in reference to the election or duties of the President of city council are found in ch. 3, § 2, which is that "at the first meeting of the city council in January of each year, after a general state election, they shall proceed to elect by ballot from their members a president and vice president. The president shall preside over the meetings of the city council, and during the absence of the mayor from the city, or his inability for any reason to discharge the duties of his office, the said president shall exercise all the powers and discharge all the duties of the mayor." Ch. 4, § 1, of the charter merely repeats the provision that the president of the city council shall, when present, preside at all its meetings.

Aside from the fact that in a certain contingency the president of the city council may become acting mayor, he has no franchise, power, or duty additional to those of other members of the council, save only that of presiding at their meetings. There is nothing in the charter indicative of an intention to confer any powers or impose any duties upon him as an officer of the city, or any as president of the city council, except those belonging, under common parliamentary law, to the presiding officer of any legislative body. sole purpose of the statute was merely to regulate the time when, and the manner in which, the city council should organize and elect their presiding officer, and to provide that, upon the happening of a certain contingency, such presiding officer, for the time . being, whoever he might be, should perform the duties of mayor. There is nothing indicating an intention to create a city office distinct from that of alderman. The president of the council must be an alderman, and, when he ceases to be an alderman, he necessarily ceases to be president of the council, whether he has occupied that position two years or only two days,-a fact which shows that he is at least not an "officer," within the purview of ch. 2, § 1, fixing the term of appointive officers at two years. While acting as president of the council, he still continues to be an alderman, and his ceasing to be president in no way effects his status as alderman. From the earliest history of legislative bodies the rule of parliamentary law has been that a legislative body having the power to choose its own presiding officer from its own members has also the inherent power to remove such officer at its will or pleasure, unless prohibited by some express constitutional or statutory provision. In Cushing's Law and Practice of Legislative Assemblies, at section 299, the author says: "The presiding officer, being freely elected by the members by reason of the confidence which they have in him, is removable by them at their pleasure, in the same manner, whenever he becomes permanently unable, by reason of sickness or otherwise, to discharge the duties of his place, and does not resign his office, or whenever he has in any manner or for any cause forfeited or lost the confidence upon the strength of which he was elected." And in section 294 the same author says: "The presiding officer * * * is but the servant of the house to declare its will and to obey implicitly all its commands,"—a duty so forcibly expressed in the memorable reply of the speaker of the house of commons to Charles I.

This control of a legislative body over their presiding officer rests upon the fundamental principle that the majority has the power to control the action of the body within the limits of its jurisdiction, except as otherwise provided by positive law.

A city council is a local legislative body, and in creating it the legislature, by implication, within the limits prescribed, conferred upon it all the powers and privileges in the manner of conducting their own proceedings usually recognized by parliamentary law as belonging to such bodies; and it would require a clear and explicit expression of legislative intention to that effect to justify the conclusion that it was the design to deprive this city council of the universally recognized parliamentary right of control over their own presiding officer. Such an intention is not to be inferred from the mere fact that, in order to insure a prompt and orderly organization of that body, the legislature has given directions as to the time and manner of doing so.

We think the right of the council to change their presiding officer at pleasure would hardly be seriously denied except for the fact that he may in a certain contingency be called on to temporarily perform the duties of mayor. This, it is claimed, makes him something more than the mere presiding officer of the city council; that he thereby becomes an officer of the city, whom, for want of a better term, we may call "contingent mayor." We fail to see any force in this.

It would be sufficient for the purposes of this case to say that no such contingency has arisen; but we think that all this provision of the charter means is that, whenever any such contingency arises, whoever then happens to be president of the city council, for the time being, shall perform the duties of mayor. There is nothing to indicate that it was ever intended to create a distinct city office for that purpose.

In some states the law provides that in certain contingencies the speaker of the house of representatives shall perform the duties of governor; and until some seven years ago there was an act of congress providing that in a certain contingency the speaker of the house of representatives, for the time being, should act as president

of the United States. But it would hardly be claimed that the effect of such provisions was to deprive either the state or federal legislature of the usual parliamentary power over their own speaker, or to constitute such speaker a state or federal officer, distinct from that of member of the body to which he belonged.

In re Speakership of the House of Representatives, 15 Colo. 520, (25 Pac. Rep. 707,) which is a well considered case, is the only authority directly in point which we have found, but it fully covers, as we think, every question involved here.

We do not think that State v. Anderson, 45 Ohio St. 196, (12 N. E. Rep. 656,) relied on by counsel for relator, at all militates against our views. That case merely decided that the presidency of a city council was a "public office," within the meaning of a statute authorizing an action in quo warranto to be brought against any one who usurped a public office. The words "office" and "officer" are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject-matter in reference to which the terms are used. Now, from time out of mind, the law has been that quo warranto would lie, not only against one unlawfully holding or exercising a public office, but also against any one unlawfully exercising a public franchise, such as the right to preside over a public corporation. As this is a right which could not be tried in any collateral proceeding, and as a court of chancery would not interfere before a trial at law, it would follow that, if quo warranto would not lie, there would be no remedy except the inherent right of every legislative body to eject an intruder or usurper by force; hence the court, in the case referred to, being naturally and very properly desirous of so construing the statute as to give an adequate remedy, held that the word "office," as used in that statute, included the franchise or right of presiding over a city council. See Cochran v. McCleary, 22 Iowa, 75.

Our conclusion is that the president of the city council of Minneapolis is not an "officer" of the city, within the meaning of either the city charter or the constitution, but that he is merely the

officer or servant of the legislative body which elected him, and that, as such, he is removable at the will or pleasure of that body. Writ quashed.

Vanderburgh, J., absent, took no part. (Opinion published 54 N. W. Rep. 1069.)

EDWARD LONG vs. JOANNA FEWER.

Submitted on briefs April 21, 1893. Decided April 27, 1893.

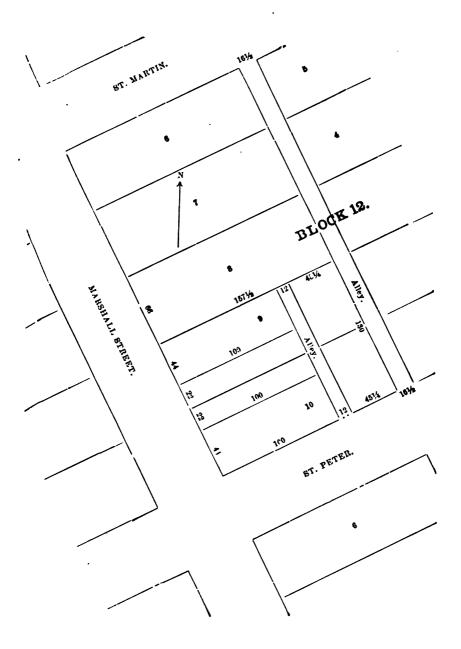
Deed Construed to Grant an Appurtenant Easement.

A deed construed, and held to grant, as appurtenant to the premises conveyed, an easement for alley purposes in adjoining land.

Appeal by defendant, Joanna Fewer, from a judgment of the District Court of Hennepin County, Frederick Hooker, J., entered May 28, 1892.

On July 3, 1857, John Kopp owned lots nine (9) and ten (10) in block twelve (12) in Bottineau's Addition to St. Anthony. The lots lay side by side in the southwest corner of the block. Each was sixty-six (66) feet front on Marshall street, and one hundred and fifty-seven and a fourth feet deep. Kopp divided up the two lots into four by cutting off the rear forty-five and a fourth feet as one lot, and making next to it an alley twelve feet wide, and making three lots of the residue fronting on Marshall street, each forty-four (44) feet front by one hundred (100) feet deep. The subdivision is shown on the map.

The middle lot of the three which front on Marshall street, Kopp and wife on that day (July 3, 1857) sold and conveyed to Charles Ende. The deed was not artfully drawn. Its material terms are recited in the opinion. On May 2, 1883, Ende conveyed to the plaintiff, Edward Long. On April 8, 1858, Kopp and wife conveyed to defendant the adjacent lot on the south and the one east of the alley. Afterwards on December 5, 1887, John Kopp, then a widower, quit-



claimed all his interest in the original lots nine (9) and ten (10) to the defendant Joanna Fewer. She afterwards in August, 1890, fenced up the twelve foot alley, claiming that plaintiff had no easement in, or right of passage over it. He commenced this action to compel her to take down the fence, and to enjoin her from obstructing the alley. The issues were tried April 30, 1891. Findings were made and judgment for plaintiff entered thereon. Defendant appeals.

Geo. R. Robinson, for appellant.

Defendant insists on this appeal that the language used in the conveyance to Ende under which plaintiff claims, viz. "reserved by John Kopp," excludes any implication of a grant. Defendant concedes that if the conveyance had granted to an alley, an easement would have passed to the grantee, but a reservation in the legal sense is some right reserved out of the thing granted. Here the thing is not granted, but reserved, that is, retained, kept back.

Koon, Whelan & Bennett, for respondent.

The language of the deed from Kopp to Ende, and from Ende to the plaintiff, was sufficient to grant an easement of a right of way over the alley as an appurtenance to his lot.

Selling land and bounding it on an alley, which lies on grantor's own land, conveys a right of way over the alley. O'Linda v. Lothrop, 21 Pick. 292; Parker v. Smith, 17 Mass. 413; Bedeau v. Mead, 14 Barb. 328; Smith v. Lock, 18 Mich. 56; Fox v. Union Sugar Refinery, 109 Mass. 292; Cox v. James, 45 N. Y. 557.

It is claimed by defendant that the effect of the expression in these deeds, "reserved by John Kopp," destroys the easement which would have been granted if the land had been merely described as bounded on the alley. A deed is to be construed as a whole, or as has been well said, by "taking it by the four corners." The circumstances surrounding the making of it, may be taken into account. Sanborn v. City of Minneapolis, 35 Minn. 314; St. Paul Union Depot Co. v. St. Paul, M. & M. Ry. Co., 35 Minn. 320; Lovejoy v. Gaskill, 30 Minn. 137; Winston v. Johnson, 42 Minn. 398.

The expression "reserved by John Kopp" evidently means set

apart, or set aside, by John Kopp, for use as an alley, as an appurtenance to, and for the benefit of, these sublots which he had carved out of the original tract. This is the only reasonable meaning that any one can give this expression used in the deed; whether he construes it entirely by the deed itself, or in connection with the circumstances surrounding the making of it. It is merely descriptive of the alley, and is an assurance from the grantor to his grantee, that the land embraced in it has been set apart as an alley.

MITCHELL, J. The only question in this case arises upon the construction of the granting clause in a deed from one Kopp to one Ende, plaintiff's grantor. Kopp owned the whole of lots nine (9) and ten (10) in block twelve (12) of Bottineau's addition to St. Anthony. These lots had a westerly frontage of 132 feet on Marshall street, and a southerly frontage of 157 feet on St. Peter street.

The grant in the deed from Kopp to Ende, which will be better understood in connection with the plat, was of "twenty-two (22) feet of the southwest corner of lot number nine, (9,) and twenty-two (22) feet of the northwest corner of lot number ten, (10,) in block number twelve, (12,) of Bottineau's addition to St. Anthony, as surveyed by John R. Marshall, Esq.; said described pieces and parcels of land all fronting on Marshall street, and running back from said street one hundred (100) feet to an alley, reserved by John Kopp. Said alley is twelve (12) feet wide, and said alley to be used as such, said alley to be used for no other purpose. It commences on St. Peter street, one hundred feet from Marshall street, and running through said lots nine (9) and ten (10) of said block."

The land in controversy is the twelve-foot strip referred to in this deed as an alley. Plaintiff claims an easement in it for alley purposes, under the deed to Ende. On the other hand, defendant, under a subsequent deed from Kopp, claims to be the owner in fee simple absolute. Her claim is based wholly upon the strict literal meaning of the word "reserved," used in the deed to Ende; and numerous lexicographers are cited to the effect that "to reserve" is to "retain," "hold back," or "except;" and hence it is urged that to construe this deed as granting an easement would be to convert a reservation into a grant. But the day is past for adhering to technical or literal meanings of particular words in a deed or other contract

against the plain intention of the parties as gathered from the entire instrument. Examining the language of this deed in the light of the situation of the property and the parties it is perfectly apparent that the expression "reserved" was not used in the sense of excepting something. Kopp was the absolute owner of the entire premises, and, had it been his intention to grant only the 44 by 100 feet, the most natural thing for him to do would have been to have said just that, and nothing more. If he had described the 44 by 100 feet as bounded by an alley, without adding anything else, the law is well settled that the deed would by implication have passed an easement in the But what was here added was evidently intended as descriptive of the alley, and as an assurance to the grantee that the strip described had been set apart by the grantor for alley purposes as appurtenant to and for the benefit of the abutting sublots into which he was dividing the land. This is the only reasonable construction that can be placed on it.

Our opinion, therefore, is that the deed granted, as appurtenant to the premises conveyed, an easement for alley purposes in the land in dispute.

Judgment affirmed.

Vanderburgh, J., absent, took no part. (Opinion published 54 N. W. Rep. 1071.)

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f62	292
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WALTER E. ALAIR vs. NORTHERN PACIFIC RAILROAD Co.

Argued April 12, 1893. Decided April 27, 1898.

Carrier's Liability Limited by Contract.

The owner of some horses delivered them to a common carrier for transportation under a contract, signed by him, stating the terms and conditions upon which the property was to be transported, by which it was agreed "that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to wit: Each horse, \$100; each ox, \$50; each bull, \$50; each cow, \$30; * * * such valuation being that whereon the rate of compensation to the company for its services and risk connected with said property is based." Held

that, assuming that the contract was fairly made for the purposes therein expressed, (the sums named being approximately the average values of ordinary domestic animals,) this was a just and reasonable mode of securing a due proportion between the amount for which the carrier becomes responsible and the freight which he receives, and of protecting himself against extravagant valuations in case of loss, and that the recovery of the owner will be limited to the sums named, even although the loss occurred through the negligence of the carrier or his servants.

Appeal by defendant, Northern Pacific Railroad Company, from an order of the District Court of Ramsey County, J. J. Egan, J., made November 7, 1892, sustaining a demurrer to its answer.

The plaintiff, Walter E. Alair, on April 4, 1891, delivered to defendant at Minnesota Transfer in St. Paul, eighteen horses to be transported to Seattle, Washington. The plaintiff at the same time entered into a contract with the company in which it was agreed that the value of each horse did not exceed \$100; such valuation being that whereon the rate of compensation to the company for its services and risk connected with the property was based. Seven of the horses, worth \$2,100, were killed on the route, by the negligence of the defendant in operating its railway. Prior to the commencement of this action, the company tendered to the plaintiff \$700 and afterwards brought it into court and deposited it for the plaintiff. These facts were set forth in the answer, and plaintiff demurred thereto, and the trial court sustained the demurrer. Defendant appeals.

John H. Mitchell, Tilden R. Selmes, and Wm. Allen Butler, for appellant.

Plaintiff's contention is, that the contract on which he sues is valid against the company as to the rate of freight, but void as to the agreed value of his property.

It was lawful for the defendant to make the contract with the plaintiff for the transportation of his property, agreeing as to the value of the property, and fixing the rate of freight accordingly. The terms and conditions of the contract as to such value, and the rate of freight based thereon, were just and reasonable, and should be upheld. Hart v. Pennsylvania Railroad Co., 112 U.S. 331.

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The plaintiff in this action must concede that the law in England and in most of the States of the United States accords with the above cited decision, but he claims that this court will apply a contrary rule, following Moulton v. St. Paul, M. & M. Ry. Co., 31 Minn. 85; Boehl v. Chicago, M. & St. P. Ry. Co., 44 Minn. 191.

The Moulton case is really an authority for the defendant, and the case of Boehl does not touch the point raised on this appeal.

The Moulton case was classed in the opinion in Hart v. Pennsylvania R. Co., among the authorities condemning without qualification, any limitation by a carrier of its common law liability for its negligence; but the text of the opinion of this court, does not warrant such a classification. The inadvertence has been followed in text books of later date. Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397.

Lawler, Durment & Bigelow, for respondent.

A contract made by a common carrier with a shipper is void as against public policy when it seeks to limit the amount to be recovered for loss or damage arising from the negligence of the common carrier, in the absence of any fraud upon the part of the shipper in concealing or misrepresenting the value of the freight shipped. Moulton v. St. Paul, M. & M. Ry. Co., 31 Minn. 85; Railroad Co. v. Lockwood, 17 Wall. 357; Railway Co. v. Stevens, 95 U. S. 655; Southern Express Co. v. Moon, 39 Miss. 822; United States Express Co. v. Blackman, 23 Ohio St. 144; Black v. Goodrich Transp. Co., 55 Wis. 319.

If it is competent to make a contract limiting the recovery, in case of loss, to an agreed value, there is no agreed value in the case at bar. There is no certain value agreed on in the contract.

This court has decided that a common carrier cannot limit his liability for his own negligence, either as to the right, or the amount of the recovery. Boehl v. Chicago, M. & St. P. Ry. Co., 44 Minn. 191.

MITCHELL, J. The complaint alleges the delivery by plaintiff to defendant, a common carrier, of eighteen horses for transportation;

that seven of the horses, of the value of \$2,100, were, while in transit, killed through the negligence of the defendant. Judgment is asked for \$2,100.

The answer admits the delivery and receipt of the horses for transportation, their value, and their loss through its negligence, as stated in the complaint, but alleges that the property was delivered and received upon a special written contract, executed by both parties, containing the terms and conditions on which the defendant undertook to transport it, one of which was that "it is hereby further agreed that the value of the live stock to be transported does not exceed the following mentioned sums, to wit: Each horse, \$100; each ox, \$50; each bull, \$50; each cow, \$30; * * * such valuation being that whereon the rate of compensation to this company for its services and risks connected with said property is based." The answer further alleges a tender of \$700, which is kept good by bringing the money into court. This appeal is from an order sustaining a demurrer to the answer on the ground that the facts stated do not constitute either a defense or counterclaim.

The sole question is whether this stipulation as to the value of the property is valid and binding, so as to limit the amount of plaintiff's recovery when the loss occurred through defendant's negligence. As against plaintiff's demurrer it must be assumed that this stipulation was fairly made, and for the purposes therein expressed.

How far, or in what respects, a public carrier of goods may limit his common-law hiability is by no means a new question in the courts. At common law he was practically an insurer of the property. The rule imposing this extraordinary liability had its origin in considerations of public policy; and, as the duties of a common carrier are public in their nature, in the due performance of which the public at large, as well as the particular shipper, have an interest, and as the carrier and the shipper do not stand on a footing of equality, the latter often having no choice but to accept such conditions as the former might impose, the tendency of the courts formerly was to hold that it was against public policy, or, as otherwise expressed, not just and reasonable, to permit a common carrier to stipulate for any modification of his common-law liability, even by special contract with his customer.

But in course of time, the improved state of society, the introduction of better and safer modes of transportation, the diminished opportunities of collusion and bad faith on part of the carrier, and other considerations, rendered less imperative the rigorous application of the iron rule of the common law. The result has been that the courts now uphold as just and reasonable numerous limitations to, or exemptions from, the common-law liability of carriers, which would formerly have been held against public policy and void.

In fact, it has now become the accepted general business usage (which is itself strong evidence as to what is in accord with public policy) for carriers and shippers to contract for some exemptions from the strict liability imposed by common law. At one time the courts in England had gone so far as to hold that public carriers might by special contract, and even by public notice, relieve themselves from liability for the consequences of the gross negligence, or even felony, of their servants.

This led, in 1854, to the passage of the act commonly called the "Railway and Canal Traffic Act," declaring that such carriers should be liable for loss occasioned by their own neglect or default, or that of their servants, notwithstanding any notice, condition, or declaration to the contrary, but providing that they might make such conditions with respect to the carriage of goods as should be adjudged "just and reasonable" by the court or judge before whom the case should be tried. It is significant of the views of parliament as to what conditions would be just and reasonable, and hence in accordance with public policy, in case of the transportation of live stock, that this same statute provides that no greater damages shall be received for any animal than certain specified sums, (presumably fixed with reference to the average value of ordinary animals,) unless a higher value is declared by the shipper at the time of delivery. This is perhaps not without some weight in considering the justness and reasonableness of the conditions or stipulations of the contract now before us.

It would hardly be in point to consider the English decisions under this statute as to what conditions are or are not "just and reasonable," further than to say that beyond a doubt they would uphold the validity of the one now under consideration.

In the United States, at least since the case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, it has been the universal law of this country that, in the absence of a statute prohibiting it, any common carrier may by special contract limit his commonlaw liability, provided the contract is "just and reasonable in the eye of the law." We adopt this form of statement advisedly, for in all the cases the ultimate test applied by the courts in determining whether a condition limiting the common-law liability was or was not against public policy has been whether, under all the circumstances, it was or was not just and reasonable in the eye of the law. In the leading case of Railroad Co. v. Lockwood, 17 Wall. 357, the court placed its decision that a carrier could not stipulate for exemption from responsibility for the negligence of himself or his servants upon that express ground. The English statute, already referred to, in using the expression "just and reasonable," but adopted the existing rule of law. The right of the common carrier to limit his common law liability by special contract was fully recognized by this court as long ago as Christenson v. American Express Co., 15 Minn. 270, (Gil. 208;) but, in accord with the great weight of authority in this country, we have held that he cannot contract for exemption, either in whole or in part, from liability for the negligence of himself or his servants; that such an exemption is against public policy, because it would enable him to put off the essential duties of his public employment. Christenson v. American Express Co., supra; Shriver v. Sioux City & St. P. R. Co., 24 Minn. 506; Ortt v. Minneapolis & St. L. Ry. Co., 36 Minn. 396, (31 N. W. Rep. 519;) Moulton v. St. Paul, M. & M. Ry. Co., 31 Minn. 85, (16 N. W. Rep. 497;) Boehl v. Chicago, M. & St. P. Ry. Co., 44 Minn. 191, (46 N. W. Rep. 333.)

The case, therefore, comes down to a question of the construction to be placed on this stipulation. If the purpose of it was merely to place a limit on the amount for which the defendant should be liable, then clearly, as to losses resulting from negligence, it is not just or reasonable, and is not binding on the plaintiff. On the other hand, if it was a stipulation as to the value of the property, fairly and honestly made as the basis of the carrier's charges and responsibility, then we think it ought to be upheld

as a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.

At this point we may suggest that, so far as the question now under consideration is concerned, we see no difference between a case like the present, where the stipulation is that the value of the property does not exceed a specified sum, and one where the value is stipulated to be a specified sum; also that it makes no difference whether the valuation expressed in the contract is one previously named by the shipper on requirement of the carrier, or one inserted in the contract by the carrier without being named by the shipper, but acquiesced in by him. In either case it becomes a part of the contract on which the minds of the parties meet, and on which they act. Also, if the purpose of the stipulation is a lawful and proper one, the mere fact that it may incidentally have the effect of limiting the amount of the carrier's liability in case of loss caused by negligence will not render it invalid.

Contracts of this kind relating to the transportation of live stock are very common, and their reasonableness, at least as applied to that class of property, seems to us quite apparent. may be presumed to know approximately the average value of ordinary domestic animals, but it is well known that many animals have a special value because of some peculiar qualities—such as speed or pedigree—which are not apparent from mere inspection. For example, a horse which, to one not acquainted with it, might not appear to be worth more than any ordinary horse, might, because of speed, be worth \$10,000. The agents of common carriers are not expected to be, and usually are not, experts as to the special or peculiar value of particular animals. Ordinarily they would know nothing about the matter except what they learned from the shipper's statement. Presumably, the charges for transportation are to a considerable extent based on the value of the property. Moreover, the measure of care on part of the carrier will naturally be commensurate with the value of the property intrusted to him. Consequently the law always required entire good faith on part of the shipper in stating the nature and value of property delivered to a carrier for transportation. Even when the common-law liability of

carriers was enforced most rigorously, the courts always upheld limitations of it imposed for the purpose of procuring a full disclosure of the value of the property, especially of articles of unusual value, or subject to extra hazard. This is illustrated in that numerous class of cases where packages whose contents were not open to inspection were delivered to an express company or other carrier by the owner, who accepted a receipt therefor containing a condition that in case of loss the holder should not demand beyond a specified sum, at which the article was thereby valued, unless a greater value was expressed or declared. But we see no difference in principle between a case where the value of the property is unknown to the carrier because inclosed in a box, and one where it is unknown because dependent on latent qualities not ordinarily ascertainable by inspection. We think we are justified in taking judicial notice of the fact that the maximum values placed by this contract on different kinds of domestic animals are approximately those of average ordinary animals in the country through which defendant does busi-By executing this contract the plaintiff stipulated, and in effect represented to defendant, that his horses were not worth to exceed \$100 each, and that the charges for transportation should be based on that valuation. Assuming, as we must, that the contract was fairly made for the purposes expressed in it, we think it ought to be upheld as just and reasonable. It is not in any proper sense a contract for exemption from the consequences of negligence. this view we are sustained by the great weight of authority. v. Pennsylvania R. Co., 112 U. S. 331, (5 Sup. Ct. Rep. 151;) Squire v. New York Cent. R. Co., 98 Mass. 239; Graves v. Lake Shore & M. S. R. Co., 137 Mass. 33; Hill v. Boston, H. T. & W. R. Co., 144 Mass. 284, (10 N. E. Rep. 836;) South & North Ala. R. Co. v. Henlein, 52 Ala. 606; Louisville & N. R. Co. v. Sherrod, 84 Ala. 178, (4 South. Rep. 29;) Harvey v. Terre Haute & I. R. Co., 74 Mo. 538: Louisville & N. R. Co. v. Sowell, 90 Tenn. 17, (15 S. W. Rep. 837;) Duntley v. Boston & M. R. Co., 66 N. H. ---, (20 Atl. Rep. 327.)

We cite no cases from jurisdictions where contracts for exemption from liability for negligence are upheld, as they would not be in point in this state. In fact, it will be found that there are very few authorities against our views. Most of the cases, usually carelessly cited as authority on the other side of this question, will be found, on careful examination, to be clearly distinguishable and not in point. In some of them the stipulation was purely and solely one arbitrarily limiting the amount of recovery, without regard to the value of the property, as in Moulton v. St. Paul, M. & M. Ry. Co., supra. In others it was held that the shipper never agreed to the limitation, and for that reason was not bound by it. In others the decision was expressly placed on the ground that both parties knew that the property was of much greater value than that stated in the contract, and arbitrarily inserted a sum grossly disproportionate to the true value solely for the purpose of limiting the amount of the carrier's liability.

Co., supra, and Boehl v. Chicago, M. & St. P. Ry. Co., supra, as settling the law in this state in his favor. The Moulton Case, for a reason already suggested, is not in point, and in that very case this court recognized the right of the parties to agree upon the value of the property, or to fairly liquidate the damages in case of loss in accordance with the supposed value, and also recognized the right of the carrier to require the disclosure by the shipper of the value of the property, to the end that proper care might be taken of it, and that the amount of charges for transportation might be fixed. The Boehl Case makes no allusion to any such stipulation in the contract, and contains nothing to indicate that the point was the basis of the decision, or even in the mind of the court.

A reference to the record in that case shows that the contract contained a stipulation somewhat similar to that in this case, but that, while the point that plaintiff's recovery should be limited to the amount specified was made on the trial by a request to charge, the prominent issue, aside from that of the defendant's negligence, was whether the alleged contract containing this provision was in fact plaintiff's contract, and the briefs of counsel show that the point was barely alluded to on the argument in this court; hence we do not consider the case as an authority controlling the present one.

Counsel for plaintiff have argued this case on the assumption that defendant knew, at the time of the shipment of the property, that these horses were actually worth \$2,100, but there is no warrant for this. It by no means follows, because defendant now knows and admits their value to have been \$2,100, that it knew that fact when it received the property. What would be the effect if defendant then knew that fact is a question not now before us, and which we are not called on to decide. We may say, however, that if both parties, knowing the actual value of the property, arbitrarily insert in the bill of lading a much less sum, grossly disproportionate to the real value, for the purpose of limiting the liability of the carrier for the consequences of its negligence, the stipulation would be invalid. Order reversed.

VANDERBURGH and COLLINS, JJ., absent, took no part. (Opinion published 54 N. W. Rep. 1072.)

LEBOY STEBBINS vs. ONIAS HALL.

Submitted on briefs April 4, 1893. Decided April 27, 1893.

Judgment affirmed.

Appeal by defendant, Onias Hall, from a judgment of the District Court of Dodge County, *Thomas S. Buckham*, J., entered December 7, 1892, against him for \$127.15.

The plaintiff, Leroy Stebbins, commenced this action in a Justice's Court to recover a balance of \$90.23 and interest, for threshing the grain of defendant. For answer, defendant alleged that the entire threshing bill was \$168.29, that he made payments thereon, and on December 15, 1891, he had a settlement with plaintiff and there was found due plaintiff only \$38.29. For counterclaim he alleged that he afterwards kept and cared for eight cows for plaintiff which was worth \$31, and he offered judgment for the balance \$7.29. Plaintiff on the trial in the Justice's Court, was a witness to prove his claim for threshing. On his cross-examination he was asked questions tending to prove the counterclaim. This evidence was objected to as not proper cross-examination and was excluded. Defendant excepted, gave no evidence on his part, and rested. The plaintiff

had judgment April 21, 1892, for \$98.09. Defendant appealed to the District Court on questions of law alone, where the judgment was affirmed, with costs. The defendant then appealed to this court.

S. T. Littleton, for appellant.

Wheelock & Sperry, for respondent.

MITCHELL, J. The original account of plaintiff against defendant amounted, according to the evidence, to \$170.23, and according to defendant's answer to \$168.29,—a difference of less than \$2.

The only defenses attempted to be set up in defendant's answer were—First, that the parties had an accounting and settlement in December, 1891, in which they agreed on the balance due plaintiff; second, that subsequently to such settlement the plaintiff became indebted to defendant in certain sums for caring for and feeding some cows.

How the evidence offered by defendant and ruled out by the justice, that plaintiff had bought of defendant some cattle, the purchase price of which was to be credited on account, could have tended to prove the allegations of the answer, it is rather difficult to understand. Certainly, without some explanation to the court, the materiality of the evidence (if it had any) would not be apparent, and its exclusion under the circumstances constitutes no error.

Judgment affirmed.

VANDERBURGH, J., absent, took no part. (Opinion published 54 N. W. Rep. 1110.)

FREDERICK J. ROMER vs. JOHN B. CONTER et al.

Submitted on briefs April 21, 1893. Decided May 5, 1898.

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Pleading-Anticipating Defense.

The rule that a complaint need not anticipate and negative matter of defense—as payment—applied.

Execution of an Instrument Proved by the Certificate of its Acknowledgment.

An official certificate of acknowledgment of the execution of an indemnity bond constitutes *prima facie* proof of its execution. Charge of the court construed as having this meaning.

Order of Proofs.

The rule that the order of proof may be regulated by the discretion of the court applied.

Appeal by defendant, John B. Conter, from an order of the District Court of Ramsey County, *Chas. D. Kerr*, J., made June 18, 1892, denying his motion for a new trial.

On June 6, 1889, Frank W. Farrar and Seth K. Howes owned eight lots in Summit Terrace, St. Paul, and made a contract with plaintiff, Frederick J. Romer, to build thereon for them a block of eight houses for \$48,686; and he on June 11, 1889, gave them a bond for the use of any and all persons who might do work or furnish materials, conditioned to pay all just claims for such work and ma-The defendants Ferodowill & Sickel on the same day contracted with plaintiff to furnish materials for, and do the brick-work on, the houses. They, as principals, and the defendant John B. Conter as surety, also gave plaintiff a bond in the penal sum of \$7,200, conditioned to perform their contract and pay for all labor The execution of this bond was acknowledged by and materials. all the obligors before a Notary Public. Ferodowill & Sickel bought 146,500 brick for the work, of the Wisconsin Red Pressed Brick Company and agreed to pay therefor \$1,228.25. The brick were worth that sum and were delivered and used in the performance of the subcontract, but defendants paid thereon only \$656. The Brick Company brought suit on the bond given by plaintiff and he was compelled to, and did, pay the balance, \$679.84, including interest and costs. Plaintiff then brought this action upon the bond

so given by the subcontractors and Conter, to recover of them the amount he so paid.

The defendant Conter alone appeared. He answered that he never executed or acknowledged the bond to the plaintiff. The issues were tried January 26, 1892, and plaintiff had a verdict for the amount claimed. On the trial, plaintiff offered in evidence the bond purporting to have been executed by the subcontractors and defendant Conter, without giving any proof of its execution save the certificate of acknowledgment indorsed thereon. Defendant objected, but was overruled and he excepted. Plaintiff rested without giving any other evidence of its execution. The defendant and his witnesses then testified that he never signed or delivered the bond. The plaintiff was then permitted over the objection of defendant, to introduce evidence of the execution of the bond by defendant and that the signatures thereto were genuine. then offered in evidence two checks drawn by him to the order of defendant, and indorsed by Conter and stamped paid by the bank. These were objected to by defendant as incompetent, but were admitted and he excepted to the ruling. They were marked Exhibits 14 and 17, and seem to have been offered to enable the jury to compare defendant Conter's signature thereon with his disputed signature to the bond. Morrison v. Porter, 35 Minn. 425.

P. W. Faricy and M. D. Munn, for appellant.
Otis & Godfrey and O. E. Holman, for respondent.

DICKINSON, J. The cause of action set forth in the complaint is in brief as follows:

In June, 1889, the plaintiff contracted with the owners of certain lands to erect a block of buildings thereon, obligating himself by a bond with sureties for the use of all persons who might furnish materials or labor for the construction, with the condition that their claims should be paid. The defendants Ferodowill & Sickel were subcontractors under the plaintiff, and they obligated themselves to him by bond, with the appellant, Conter, as their surety, as is alleged, conditioned that they should pay for all labor and material contributed in the performance of their subcontract. Certain persons supplied material to Ferodowill & Sickel, the subcontractors, for which the latter did not pay. Such material men then sued this

plaintiff and his sureties on their bond, and recovered judgments, which the plaintiff paid. Thereupon he instituted this action on the bond executed to him by the subcontractors, to recover the amounts of the judgments so recovered against and paid by him. A verdict was rendered for the plaintiff, a new trial refused, and the defendant Conter has appealed. He denies that he executed the bond.

- 1. The complaint shows upon its face a right of recovery. If the plaintiff has any means of reimbursement, or has been reimbursed or paid for what he has been compelled to pay on account of the subcontractors, that would have properly been matter of defense, in so far as it may have constituted a defense. The plaintiff was not required to plead the nonexistence of any such facts.
- 2. The bond bearing an official certificate of acknowledgment of the execution of it by the obligors named in it, and whose names appeared to have been subscribed thereto, the instrument was receivable in evidence without other proof of its execution. 1878 G. S. ch. 73, §§ 67-96. Section 89 of the same chapter does not qualify the effect or force of an official acknowledgment under the statutes above cited as prima facie proof of the execution of instruments authorized to be acknowledged. Even though the execution is denied under oath, the certificate of acknowledgment is prima facie evidence of the execution.
- 3. The ruling of the court allowing the plaintiff to present evidence of the execution of the bond by Conter after the latter had introduced his evidence in support of his denial of the execution was a matter within the discretion of the court.
- 4. The court instructed the jury that the burden of proof rested upon the plaintiff, in the first instance, to establish the fact that the bond was executed by Conter; and that he (plaintiff) had introduced the bond itself bearing the certificate of acknowledgment, and then added: "This circumstance, under the law of this state upon that subject, entitled the bond to be introduced and received in evidence, and shifted the burden of proof onto the defendant Conter to show that he did not execute the bond." Exception was taken to that part of the charge which we have recited. The point is now argued as though the court had instructed the jury that, the bond having been presented bearing a certificate of acknowledgment, the general

burden of proof, upon the issue as to its execution, rested upon the defendant. But that was not the language or effect of the instruction. The more apparent meaning was that the certificate of acknowledgment constituted prima facie proof of the execution, so that it then devolved upon the defendant to show that he did not execute it. This was strictly true. If the defendant had offered no evidence upon the point, the plaintiff's prima facie case would have become conclusive.

As to the assigned error in respect to the receiving of Exhibits 14 and 17 in evidence, the appellant declines in his brief to do more than to reiterate his assignment of error. We therefore decline to consider it. If there was anything in the point it deserved some consideration at the hands of the appellant.

Order affirmed.

VANDERBURGH, J., absent, took no part. (Opinion published 54 N. W. Rep. 1053.)

PETER BESEMAN vs. AUGUST WEBER.

Submitted on briefs April 24, 1893. Decided May 5, 1898.

Attachment in a Justice's Court.

A writ of attachment, by which an action is commenced in a justice's court, is sufficient to give jurisdiction if it be in the form prescribed by statute, requiring the defendant to be summoned to appear at the office of the justice in a specified *county*, the *town* not being named.

Appeal by plaintiff, Peter Beseman, from a judgment of the District Court of Morrison County, L. L. Baxter, J., entered April 16, 1892, in favor of defendant, August Weber, for costs.

Taylor, Calhoun & Rhodes, for appellant.

E. S. Smith, for respondent.

DICKINSON, J. This action was commenced by a writ of attachment in the court of a Justice of the Peace. Judgment was rendered in favor of the plaintiff, which, on appeal to the district court, was

reversed. The sole question is whether, by reason of the fact that in that part of the writ which serves the purposes of a summons the justice directed the defendant to be summoned to appear "at my office in said county [of Morrison,]" without naming the town, the justice failed to acquire jurisdiction over the defendant who was thus summoned.

The defendant appeared specially on the return day, and moved that the cause be dismissed for want of jurisdiction. This being denied, he then moved that the attachment be dissolved, because no inventory had been served. This was granted, and the defendant then left the court. The justice proceeded to hear the case of the plaintiff, and thereupon rendered judgment in his favor.

The statute 1878 G. S. ch. 65, § 2, requires every Justice to keep his office in the town, city, or ward for which he is elected; but he may, for the convenience of the parties, make any process returnable, and may hold his court, at any place appointed by him in a town or ward adjoining that in which he resides.

By § 13 it is provided that in all cases not otherwise provided for the first process shall be by summons, commanding the officer to summon the defendant to appear before such justice at a time and place expressed in such summons. 1878 G. S. ch. 65, § 138, declares that "the following or equivalent forms shall be used by justices of the peace in proceedings to be had under the provisions of this chapter." The form there prescribed for a writ of attachment is exactly such as was used by the justice in this case, requiring the defendant to be summoned to appear "at my office in said county."

The writ, including the summons to the defendant, was in exact accordance with the requirements of the statute, and the justice acquired jurisdiction. The form prescribed by § 138 was sufficient by the very terms of the law. If it be assumed that, in the case of an action commenced by summons, the town where it is returnable should be stated, it may not be very apparent why the same particularity should not have been prescribed with respect to the summons contained in a writ of attachment. But, however it may be in the former case, we do not hesitate to decide that in the latter a writ in exact accordance with the statutory form is sufficient. There can be no such great practical inconvenience or uncertainty in such a case as to the place where the defendant is required to appear as

to lead to the conclusion that the legislature did not mean just what in the plainest terms it has said. Each justice is elected for a particular town, city, or other definite district, and he is required to keep his office therein. Hence a defendant may always discover, if he does not know, in what town or district the justice's office is.

It is unnecessary to consider the effect, as respects the subject of jurisdiction, of the motion made to dissolve the attachment.

The judgment of the district court must be reversed, and that of the justice of the peace affirmed.

Vanderburgh, J., did not take part. (Opinion published 54 N. W. Rep. 1053.)

CARL H. DOUGLAS vs. N. G. LEIGHTON et al.

Argued April 12, 1893. Decided May 5, 1893.

Performance in the Manner Contracted for, Excused by Conduct.

Plaintiff contracted to sell to defendants a quantity of saw logs at a specified price per 1,000 feet. He was to cut and bank them on a certain stream, where they were to be scaled by the surveyor general, whose scaling was to be conclusive as to the quantity. The logs were banked in such manner by the plaintiff, without necessity or excuse, so far as appears, that, as to about one third of the logs, the surveyor general, not being able to see and scale them, only "averaged" or estimated them, and so indicated in his scale bill. Held, that the plaintiff, having contracted to bank the logs with reference to their being scaled, was required to do so in such manner that they could be scaled, and the averaging of the logs, instead of a scaling, being attributable to his own fault, he cannot insist upon the conclusiveness of the "averaged" scale bill, nor rely upon a custom in the measurement of logs to estimate or average logs which could not be seen. But, the defendants having received the logs and the "averaged" scale bill without objection, the plaintiff may show that the quantity banked was actually equal to the amount set down in the scale bill, and for which he seeks to recover payment.

Appeal by plaintiff, Carl H. Douglas, from an order of the District Court of Hennepin County, *Henry G. Hicks*, J., made December 10, 1892, denying his motion for a new trial.

892, denying his motion for a new trial.

Action to recover of Nathaniel G. Leighton and others, partners, a balance of \$1,531.57 for saw logs sold and delivered. On February 19, 1886, plaintiff contracted with defendants to cut and bank about 2,000,000 feet of white pine saw logs during that winter on the Little Prairie River in Carlton County. They were to be there scaled by the Surveyor General. This scaling was to be taken and accepted by the parties as the true and final measurement of the logs. Plaintiff was then to float or "drive" the logs down the stream in the spring freshets, and deliver them in the boom at Minneapolis, and was to be paid therefor \$7.00 per thousand. The logs were so piled on the banks and in the stream that it was impracticable for the Deputy Surveyor to inspect and measure many of them, and those he estimated or averaged. Defendants knowing this, accepted and sawed the logs, sold the lumber, and paid plaintiff on account, \$11,145.85.

The issues were tried October 31, 1892. After the evidence of the plaintiff had been received, the defendants moved the Judge to direct the jury to return a verdict for the defendants. This was done, and plaintiff excepted, moved for a new trial, and being denied, appeals.

Chas. P. Barker, for appellant.

The defendants, with full knowledge, in April, 1886, of the manner of this scaling, accepted the logs, began sawing them before July, honored the scale by paying installments on the contract in accordance with its terms up to November, when the logs had been sawed up and sold, and could not be re-scaled. All this seven months they maintained absolute silence as to the manner of scaling. This was evidence upon which a jury could say defendants were estopped to dispute the scale. These facts showed an election by defendants to waive whatever objection they might have had to the scaling as made. Reid v. La Due, 66 Mich. 22; Swayze v. Carter, 41 N. J. Eq. 231.

He who remains silent when he ought to have spoken, "will not be permitted to speak when he ought to keep silent." Pratt v. Duccy, 38 Minn. 517.

By instructing the jury to find for defendants, the Judge held there was no estoppel, no waiver, and the scale bill did not show such v.53m.—12

a scale as the contract contemplated. If this scale was conclusive, then we had a right to recover on it. If it was not conclusive, then we had a right to prove another bank scale. The scale bill was, in any event, evidence of the number of logs. And if it was not evidence of the number of feet contained in that part of them which were "averaged," then we had a right to prove that fact. Bailey v. Blanchard, 62 Me. 168.

Healy & Miller, for respondents.

The complaint alleges the sale and delivery of 9,101 logs, amounting to 1,811,060 feet, at the agreed price of \$7.00 per thousand feet. It further alleges a compliance with all the terms and conditions of the contract. It admits the payment of \$11,145.85. It also alleges that when the logs were banked, the Surveyor General scaled the logs as in the contract provided. The answer denies that plaintiff complied with or performed the conditions of the contract, and puts in issue the alleged scaling. It alleges that the actual quantity of logs scaled on the bank did not exceed 6,824 logs, amounting to 1,357,950 feet, and estimated the balance, and that defendants refused to be bound by the estimate of the Surveyor General and had all the logs scaled in the boom, ascertained their quantity to be 1,502,720 feet, and no more. Defendants have overpaid plaintiff according to the boom scale. Pratt v. Ducey, 38 Minn. 517.

Upon the trial plaintiff attempted to show a waiver. This offer was objected to, and the objection properly sustained, no waiver having been pleaded. *Murphy* v. *Sherman*, 25 Minn. 196.

Plaintiff also attempted to show an estoppel. No facts constituting an estoppel were pleaded, and the court very properly sustained the objection to the evidence. Buck v. Millford, 90 Ind. 291; Warder v. Baldwin, 51 Wis. 450.

From the record, it is plain that there was no estoppel or waiver, and that the scale bill did not show a scale as the contract contemplated.

DICKINSON, J. This is an action to recover the purchase price of a quantity of saw logs sold by the plaintiff to the defendants. The controversy is as to the quantity of the logs sold and delivered, and whether the quantity, as claimed by the plaintiff, has been deter-

mined in the manner contemplated by the contract of sale. The contract was in writing. The defendants were to pay a stated price per 1,000 feet. The contract provided that the logs were "to be cut, banked, and scaled during the present winter by said Douglas (plaintiff) on the Little Prairie river, in Carlton county, Minnesota.

* Said scaling is to be done by the surveyor general when said logs are banked, and his scaling is to be taken and accepted by said parties as the true and final measurement of said logs." The plaintiff was to drive the logs down the streams, and deliver them within the limits of the Mississippi & Rum River Boom Company's booms at Minneapolis. The defendants received the logs so driven down by the plaintiff, and sawed them into lumber.

To show an official scaling of the logs, the plaintiff presented in evidence an official scale bill from the surveyor general's office, referring to the logs as having been "scaled by Deputy Peter Lavalle," at Little Prairie river, from which it appeared that there were 6,824 logs, containing 1,357,950 feet. There was the further item, designated in the scale bill as "averaged," of 2,277 logs, set down as containing 453,110 feet. The plaintiff seeks to recover for the whole amount thus stated,—1,811,060 feet. The defendants claim that the logs did not exceed in amount 1,502,720 feet, and that they were not concluded by the official scale bill as to the logs there appearing to have been "averaged."

There was testimony on the part of the plaintiff corroborating what appears, or may be inferred, from the scale bill, that in fact the surveyor only scaled the 6,824 logs; that whatever other logs may have been there they were so buried under the ice, or perhaps under the other logs, that he could not scale them, and that the 2,277 logs set down in the bill as "averaged" were not seen by the surveyor, and of course could not have been measured or intelligently estimated by him. The plaintiff offered no evidence excusing himself from fault in having the logs banked in such manner that about one third of them, according to his claim as to quantity, could not be scaled.

Under the circumstances of the case the court was right in refusing to allow the plaintiff to show a *custom* of the surveyor general, which also lumber men have accepted and acted upon, to determine by counting and averaging the quantity of logs so covered up that

they could not be scaled. We do not mean to say that estimates may not be made under some circumstances where complete measurements are impracticable. We are speaking with reference to The contract obligation of the plaintiff to cut and bank this case. the logs contemplated, as a purpose in view, the scaling of the logs on the bank by the surveyor general as the means for determining conclusively the quantity for which the defendants were to pay. It was therefore incumbent on the plaintiff to so bank the logs, so far as that could reasonably be done, that they might be scaled. The statute with reference to the scaling of logs by the proper officer contemplates actual inspection and measurement by him, and mere estimates from uncertain data or information are not authorized, unless, at least, there is some necessity for it. The plaintiff had no right, under the terms of this contract, to unnecessarily render it impossible for the officer, whose scaling was to be final between them, to measure, or even to intelligently estimate, a large proportion of the logs. Upon the case as presented the scale bill was not evidence of the quantity of logs "averaged." See Pratt v. Ducey, 38 Minn. 517, (38 N. W. Rep. 611.) Proof of a custom in general to estimate where measurement is impracticable would not have made a case for the plaintiff under the circumstances stated.

But in another particular we think there was error. fendants stood in a position which may well have been regarded as rendering them responsible for the amount of logs actually banked by the plaintiff, and all of which, as the evidence tended to show, were driven down to Minneapolis, and delivered to them as provided by the contract. They may be supposed to have known that the determination by the surveyor general as to the logs banked was in part "averaged," and there is evidence that they received and sawed the logs, making no objection until long afterwards. might well have been found that they waived their right to insist upon a scaling on the bank. If so, the plaintiff may still hold them to liability for the actual quantity of logs sold and delivered to them. We do not see that the principle of estoppel is applicable to preclude them from disputing the sufficiency of the scaling evidenced by the "averaged" scale bill. But the plaintiff offered to show the actual number and quantity of the logs under the ice, and not scaled by the surveyor general, and that they were driven down with the rest.

We think that the plaintiff should have been allowed to prove, as he attempted to do, the actual amount of the logs. For the excluding of this evidence the order refusing a new trial must be Reversed.

Vanderburgh, J., was absent on account of sickness. (Opinion published 54 N. W. Rep. 1053.)

ALICE C. GRANT vs. SAMUEL GRANT.

Submitted on briefs April 18, 1893. Decided May 5, 1893.

Joinder of Causes of Action.

Facts which would entitle plaintiff to a limited divorce may be joined in a complaint with those justifying an absolute divorce, and thereupon relief may be sought in alternative form.

Complaint Construed.

Complaint *held* sufficient as showing grounds for a limited divorce by reason of desertion and of conduct rendering it unsafe and improper for the wife to cohabit with the defendant.

Appeal by defendant, Samuel Grant, from an order of the District Court of Rice County, *Thomas S. Buckham*, J., made July 28, 1892, overruling his demurrer to his wife's complaint for divorce.

Geo. N. Baxter, for appellant.

H. S. Gipson, for respondent.

DICKINSON, J. The order overruling the demurrer to the complaint should be sustained.

- 1. There is no improper joinder of different causes of action. Facts which would entitle the plaintiff to a limited divorce only may be pleaded with those showing a cause of action for an absolute divorce, and relief in both forms may be sought alternatively. Wagner v. Wagner, 36 Minn. 239, (30 N. W. Rep. 766,) and cases cited.
- 2. The complaint undoubtedly sets forth two sufficient grounds upon which at least a limited divorce may be granted. One of

them is that the defendant had continuously compelled the plaintiff to submit to excessive intercourse with him, to such an extent as to impair her health, and to afford reason to apprehend that a continuance of this would seriously and permanently injure her health. This may well be regarded as "such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him," which is one of the specified grounds for a limited divorce. 1878 G. S. ch. 62, tit. 2, § 31. And see Melvin v. Melvin, 58 N. H. 569. Whether this would be reason for granting an absolute divorce we need not decide.

Again, it is well pleaded that the defendant has abandoned the plaintiff, and has neglected and refused to provide for her. This is also a cause for a limited divorce or separation, under the statute cited, even though the abandonment was not continued for such length of time as to entitle the plaintiff to an absolute divorce.

Since the complaint sets forth such causes of action, the general demurrer to it was properly overruled, whether or not it can be regarded as well pleading cruel and inhuman treatment in other particulars. First Nat. Bank of St. Paul v. How, 28 Minn. 150, (9 N. W. Rep. 626.) Whether the complaint is sufficient in that respect we will not now decide, it being unnecessary, and it not appearing that the matter has been considered or decided by the district court.

Order affirmed.

VANDERBURGH, J., was absent, and did not participate in this decision.

(Opinion published 54 N. W. Rep. 1059.)

S. S. Armstrong vs. Chicago, Milwaukee & St. Paul Railway Co.

Argued April 19, 1893. Decided May 5, 1893.

The Facts Stated.

The plaintiff shipped a car load of goods, including some horses, from Redding, Ill., to Chicago, over the C., S. F. & C. R. R., which terminated at Chicago. He intended to have the property transported to Lakefield, in this state, and verbally agreed with the C., S. F. & C. R. R. Co. as to what the charge should be to that point. He, however, entered into a written contract with that company merely for transportation to Chicago for a specified price, and that a person in behalf of the plaintiff should have passage with the car to take care of the property. Plaintiff sent a man with the car, giving him money to pay the freight, but gave him no express authority to enter into any contract in his behalf. At Chicago this agent, in behalf of his principal, contracted with the defendant for the further transportation from there to Lakefield, in which contract it was provided that no claim for loss or damage to the stock should be valid unless made in writing within thirty days after the same should hare occurred. After the car reached its destination the defendant retained possession a few days for nonpayment of freight. In an action for alleged negligence in the care of one of the horses after the transportation had ceased, held:

Contract Limiting Time to Claim Damages of Warehouseman.

The above condition as to notice was applicable in respect to the carrier's conduct as a warehouseman, that relation being properly incident to that of carrier.

Same-If Reasonable is Valid.

Such a contract, if made by the owner, or if authorized by him, is reasonable and valid.

Agent-Implied Authority.

From the circumstances it must be inferred that the agent in charge of the property was authorized to make any necessary and reasonable contract, as he did do, for its transportation from Chicago to Lakefield. For that purpose he stood in place of the owner.

Appeal by defendant, the Chicago, Milwaukee & St. Paul Railway Company, from an order of the District Court of Jackson County, P. E. Brown, J., denying its motion for a new trial.

The facts in this case are stated in the opinion, and in the former decision, 45 Minn. 85. The second trial was on July 7, 1891.

At the close of the plaintiff's evidence the defendant moved the court to direct a verdict for it, on the ground that there was no proof of any violation of its duty as a common carrier of goods. The plaintiff thereupon stated that he founded his claim solely upon the improper housing and care of the mare after her arrival at Lakefield in this State. The motion was denied. ant then offered in evidence the contract made with it for the plaintiff by J. G. Hepler, his agent in care of the property en route. This contract provided that no claim for loss or damage to stock should be valid, unless presented to the company in writing, within thirty days after the same occurred. Plaintiff had a verdict for **\$281.75.** Defendant moved for a new trial. This was denied, the court saying: "The plaintiff's sole claim is, that the company was negligent in the care of the mare after its liability as a common carrier had terminated. The contract requiring that notice in writing be given to it within thirty days after a loss, appears to provide for limiting its liability while the property is in transportation, and does not apply to its liability for negligence in performing its duty as a warehouse keeper, after the mare had reached her destination, and had been offered to the consignee. thority also of Hepler to make this particular contract was, under the evidence, a question of fact for the jury. He was, beyond dispute, plaintiff's agent to care for the mare and contract for her carriage from Chicago to Lakefield, but whether he had authority to make a contract as to the notice, plaintiff should give, after she had been delivered, admits of grave doubt."

Andrew C. Dunn, for appellant.

On the arrival at Lakefield, the agent Hepler refused to pay the freight and receive the mare and other property. Thereupon the defendant refused to deliver the same until the freight was paid, and assumed to take charge of the mare and other property until it should be paid. The mare was kept by defendant from the evening of March 16, until the afternoon of March 19, 1889, on which day plaintiff appeared, paid the freight and took possession of his property. The mare died (from a supposed lung fever) on March 22, 1889, while in possession of the plaintiff.

Hepler was plaintiff's agent and had authority to ship the car

from Chicago to Lakefield, and he actually did ship it, and made the contract on behalf of the plaintiff. The authority conferred upon an agent to ship for another, carries with it power and authority to make a reasonable contract to that end, and one which contains stipulations limiting the liability of the carrier. Squire v. New York Cent. R. Co., 98 Mass. 239; Christenson v. American Express Co., 15 Minn. 270, (Gil. 208;) Nelson v. Hudson River R. Co., 48 N. Y. 498. The signing by Hepler under these circumstances was equivalent to plaintiff's signing it himself. Hutchinson v. Chicago, St. P., M. & O. Ry. Co., 37 Minn. 524; Express Co. v. Caldwell, 21 Wall. 264; Lewis v. Great Western Railway Co., 5 Hurl. & N. 867; Southern Express Co. v. Hunnicutt, 54 Miss. 566.

The Judge expressly instructed the jury that if they found from the evidence that Hepler had authority to make this contract on the plaintiff's behalf, then the plaintiff could not recover in this action. So the jury were simply to consider whether or not the contract was the contract of the plaintiff.

Thomas J. Knox, for respondent.

The Judge instructed the jury that it was for them to determine under the evidence whether or not the shipping bill taken by Hepler was the contract of the plaintiff. To this instruction, both plaintiff and defendant excepted; the plaintiff upon the ground that under the pleadings and proof, it had no application to the case, the defendant not being charged as a carrier but as warehouseman. The defendant excepted upon the ground that it was the duty of the Judge to instruct the jury that it was the contract of the plaintiff, and that it was error to submit the question to the jury. Hepler was a mere servant of Armstrong, sent along with the stock to take care of it, and such a servant has no authority to contract. Buckland v. Adams Express Co., 97 Mass. 124; Gaines v. Union Transportation & Ins. Co., 28 Ohio St. 418; Park v. Preston, 108 N. Y. 434.

The case of Hutchinson v. Chicago, St. P., M. & O. Ry. Co., 37 Minn. 524, has no application, and the theory that the bill of lading was the contract under which defendant became possessed of this mare, rests only upon the other theory that Hepler was the

authorized agent of plaintiff to deliver the mare to defendant for shipment. Irish v. Milwaukee & St. P. Ry. Co., 19 Minn. 376, (Gil. 323;) Railroad Co. v. Manufacturing Co., 16 Wall. 318; Insurance Co. v. Railroad Co., 104 U. S. 146; Railroad Co. v. Pratt, 22 Wall. 123; Rawson v. Holland, 59 N. Y. 611.

These cases, as well as many others that might be cited, establish the rule that the first carrier is the agent of the shipper for the delivery of the property to the next succeeding carrier. mere servant, placed in the car for the purpose of taking care of live stock in transit, has no such authority; and where the goods are originally shipped by the owner in person, the fact that such servant is found in the car is not sufficient evidence of his authority to warrant the carrier in procuring his signature to a contract limiting its liability. Whether or not in such case, the person accompanying the stock has power to contract for their carriage, is a question of fact to be determined by the jury. The first carrier who contracts with the shipper is legally bound to transfer the property to the next succeeding carrier, and has power to bind the shipper by any contract within the scope of its own contract with the shipper. Mechem, Agency, §§ 274, 317; Graves v. Horton, 38 Minn. 66. This alleged contract relates solely to defendant's duty as a common carrier. Its object was to limit defendant's liability as such carrier and not otherwise. It must be strictly construed, and as the plaintiff's claim is against the defendant as a warehouseman after the termination of the carriage, the contract can have no application.

Contract terms which relate to the transit by way of reducing liability, are not to be extended to negligence or misconduct affecting the goods after arrival. Hutchinson, Carriers, §§ 275, 276, 277, 278; Schouler, Bailments, §§ 510, 516, 520; Burdwell v. American Express Co., 35 Minn. 344; Cream City R. Co. v. Chicago, M. & St. P. Ry. Co., 63 Wis. 93; Union Pacific R. Co. v. Moyer, 40 Kan. 184; Nicholas v. New York Cent. & H. R. Co., 89 N. Y. 370; Wheeler v. Oceanic Steam Nav. Co., 125 N. Y. 155; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170; Rice v. Hart, 118 Mass. 201; Gleadell v. Thomson, 56 N. Y. 194.

How far, and to what extent, a common carrier is permitted to limit by contract the time within which claims may be presented for loss or damage, seems to be to some extent unsettled upon the authorities. Smitha v. Louisville & N. R. Co., 86 Tenn. 198; Owen v. Louisville & N. Ry. Co., 87 Ky. 626; Southern Express Co. v. Caperton, 44 Ala. 101.

DICKINSON, J. A former appeal in this action is reported in 45 Minn. 85, (47 N. W. Rep. 459.) Upon a second trial a verdict was rendered for the plaintiff. The defendant appeals from an order refusing a new trial. The nature of the complaint, and the particular ground upon which recovery was sought, are stated in the opinion on the former appeal. The case, as now before us, involves some questions not before presented.

After the plaintiff had introduced his evidence in chief, he voluntarily elected to rest his right to recover on the alleged negligence of the defendant in respect to the care of the horse after it had reached its destination, at Lakefield. It appeared that the plaintiff shipped the horse, with some other horses and various kinds of personal property belonging to him, the whole comprising one car load, from Redding, Ill., and that the final destination was Lake-The transportation was by the Chicago, Santa field, in this state. Fe & California Railroad from Redding to Chicago, and from Chicago to Lakefield it was over this defendant's road. The plaintiff personally entered into a written or printed contract with the former road for transportation from Redding to Chicago, for which the freight named was \$14. This contract contained a provision for the transportation, with the car, of a person, in behalf of the owner, to take care of the stock. It contained some provisions in the nature of restrictions upon the liability of the carrier, including one making it a condition precedent to a right of action against the carrier for damages that a claim for damages should be made in writing, within ten days from the time the stock should be removed from the car. This written contract makes no provision for, or allusion to, a shipment beyond Chicago.

The plaintiff sent a man by the name of Hepler with the car, to take care of the property, from Redding to Lakefield, and gave him money to pay the freight to the latter place. At Chicago,

when the car was transferred to and shipped over the road of this defendant, Hepler assumed, in behalf of the plaintiff, to enter into a formal contract with the company for the transportation to Lakefield, and which contained this, among other provisions: "Sixth. That no claim for loss or damages to stock shall be valid unless presented to the company in writing within thirty days after the same shall have occurred." This contract also recognized Hepler as being in charge of the property, and served as a pass for himself, he not being called upon to pay fare.

When the car reached Lakefield, Hepler had not money enough to pay the freight demanded, and for that reason the defendant refused to let him take the property away, and so it remained in the control of the defendant a few days. It is claimed that the horse contracted lung fever during that time, for want of proper care on the part of the defendant, and the horse died of that disease a few days after it was delivered to the plaintiff.

The authority of Hepler to make a contract containing a limitation like that above recited, and the legal effect of such a contract, if authorized, are the important points in this case.

It is contended on the part of the respondent that the sixth clause of the contract above recited is to be construed as referring only to claims for damages on account of some neglect or fault of the defendant in respect to its duties as carrier, as distinguished from those of a warehouseman, after the completion of the transportation, and hence that it is inapplicable to this case. Such a construction cannot be given to the contract under the circumstances here presented. So far as appears, the defendant's retention of the property after it reached its destination was rightful, because of the nonpayment of its charges for freight, which do not appear to have been more than it had a right to demand. The retention was properly incident to the contract for transportation, as was considered when the case was here before, and there is no good reason why this sixth provision of the contract should be deemed inapplicable for the protection of the carrier in respect to the ordinary and incidental duties of warehouseman, which rested upon it when its duties as a carrier ceased.

If this is to be taken to have been the contract of the plaintiff, the requirement that written notice of any claim for damages should be given within thirty days after the same should have occurred was a reasonable provision, not only for the protection of the carrier against fraudulent claims, but to enable it to ascertain the facts upon which any claim for damages might be founded. A common carrier may, by special contract, thus limit its general liability. Cole v. Western Union Tel. Co., 33 Minn. 227, (22 N. W. Rep. 385;) Lewis v. Great Western Ry. Co., 5 Hurl. & N. 867; Express Co. v. Caldwell, 21 Wall. 264; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 451, (28 N. E. Rep. 394;) Southern Express Co. v. Hunnicutt, 54 Miss. 566; United States Express Co. v. Harris, 51 Ind. 127; Wolf v. Western Union Tel. Co., 62 Pa. St. 83; Glenn v. Southern Express Co., 86 Tenn. 594, (8 S. W. Rep. 152.) The time—thirty days—was reasonable. Cole v. Western Union Tel. Co., supra.

The court so ruled at the trial, but left it for the jury to determine from the evidence whether Hepler had authority to make the contract for the plaintiff. In view of the instructions of the court, it is apparent that the jury must have found that Hepler had no authority to make such a contract. It seems to us that the legal effect of the evidence was to conclusively show the contrary.

It is true that the evidence showed, or tended to show, that the plaintiff did not expressly authorize Hepler to enter into any contract for transportation, and whatever authority the latter had is only to be inferred from the circumstances of the case, which we have already stated in part. These facts may be said to have been conclusively shown: (1) That the plaintiff shipped the property at Redding for the purpose of having it transported by way of Chicago to Lakefield, in this state; (2) that he sent the man Hepler with the car, and in charge of the property, who was to go through with it to its destination, and gave to him the money to pay the freight; and (3) that the plaintiff did not personally contract for transportation beyond Chicago, the terminus of the road on which the property was shipped, and with which road, only, did he personally make any contract. Such being the case, the agent thus placed in charge of the property will be deemed to have had im-

plied authority to make such contract at Chicago for the continued transportation as was necessary and reasonable. For that purpose he represented the owner, and was the only person with whom the carrier from Chicago to Lakefield (this defendant) could deal or contract. Squire v. New-York Cent. R. Co., 98 Mass. 239; Hill v. Boston, H. T. & W. R. Co., 144 Mass. 284, (10 N. E. Rep. 836;) Aldridge v. Great Western Ry. Co., 15 C. B. (N. S.) 582, 599; Nelson v. Hudson River R. Co., 48 N. Y. 498; York Co. v. Central Railroad, 3 Wall. 107; Hutch. Carr. (2d Ed.) §§ 265, 266. See, also, Rauson v. Holland, 59 N. Y. 611; Christenson v. American Express Co., 15 Minn. 270, (Gil. 208.) The case of Squire v. New-York Cent. R. Co., supra, was very similar to that under consideration.

We have said that the plaintiff did not personally contract for the transportation beyond Chicago, although it does appear from his testimony that he agreed with the company on whose road he shipped the property for a through rate of \$50 for the car. formal contract with that company, signed by him and by the company's agent, was only for transportation to Chicago for the agreed price of \$14. It makes no reference to forwarding or to transportation beyond that place; and the plaintiff testified that he "contracted with the Santa Fe line to Chicago, and then he [Hepler] had to ship it over the Milwaukee to Lakefield." bare agreement of the plaintiff with the first carrier as to the freight to be paid to the point of destination, considered in connection with the formal contract for transportation to Chicago only, the terminus of that carrier's line, cannot be regarded as being a complete contract made by the plaintiff for the transportation to the ultimate destination, so as to exclude the inference that the agent sent by him in charge of the property had authority to contract with connecting carriers beyond Chicago. Lamb v. Camden & Amboy R. & T. Co., 46 N. Y. 271; Camden & Amboy R. Co. v. Forsyth, 61 Pa. St. 81; Converse v. Norwich Transportation Co., 33 Conn. 166; Collins v. Bristol & E. Ry. Co., 38 Eng. Law & Eq. 593.

No notice was given of the plaintiff's claim, in accordance with this provision of the contract, nor was the failure to give notice in any way excused.

For the reasons here stated, we are of the opinion that the case did not justify submitting to the jury the question as to Hepler's authority, and that the verdict cannot be sustained.

Order reversed.

VANDERBURGH, J., being necessarily absent, took no part in this decision.

(Opinion published 54 N. W. Rep. 1059.)

CAROLINA ANDERSON et al. vs. Scandia Bank of Minneapolis.

Argued by appellant, submitted on brief by respondents, April 20, 1893. Decided May 5, 1893.

Parties to Actions.

A person having no interest in the subject of an action is not a necessary party thereto.

Voluntary Payment of Usury.

Under the usury law of 1879, the borrower, who has voluntarily paid to the lender any part of the principal loaned, or who has so paid interest, but not exceeding the rate of ten per cent. a year, cannot compel the repayment of the same.

Joinder of Causes of Action.

In an action by a husband and wife to avoid usurious securities given by them upon a loan made to the wife, it is improper to join a cause of action by the wife alone to recover back money paid by her upon the usurious contract.

Appeal by defendant, the Scandia Bank of Minneapolis, from an order of the District Court of Hennepin County, Wm. Lochren, J., made July 6, 1892, overruling its demurrer to the complaint.

The complaint stated that plaintiff Carolina Anderson, on May 27, 1890, borrowed of defendant \$14,500 for six months and agreed to pay for the use thereof, a bonus of \$1,500 and interest on the total \$16,000 at the rate of ten per cent. a year. To secure payment and to avoid the appearance of usury, she and her husband, the plaintiff Zacharias Anderson, made their note and executed a mortgage on her real estate to Malakias A. Holmer, for the

\$16,000 due in six months thereafter, and bearing interest at the rate of ten per cent. a year. Holmer at the same time indorsed the note and assigned the mortgage to the defendant. Holmer had no interest in the loan or in the note or mortgage. The plaintiff Carolina Anderson afterwards paid on the note \$4,600 of the principal and \$2,280 interest. Holmer was not made a party to the action. The prayer of the complaint was, that the note and mortgage be adjudged usurious and void, and that they be surrendered and canceled, and that the wife recover of defendant the \$6,880 so paid, with interest thereon from the date of the commencement of the action.

The defendant demurred to the complaint on the ground that Holmer was not made a party to the action; and on the further ground that the equitable cause of action of husband and wife to cancel the note and mortgage, was united with an action at law by the wife alone, to recover the \$6,880, so paid by her; and it demurred to this last cause of action on the ground that the complaint did not state facts sufficient to constitute a cause of action for its recovery.

The demurrer was overruled and defendant appeals.

Ueland & Holt, for appellant.

The action is among other things for the cancellation of a note and mortgage, hence of an equitable nature. In such action all persons having rights or liabilities growing out of the subjectmatter, are necessary parties. Malakias A. Holmer is a necessary party. He is one of the parties to the note and mortgage. One party to a written contract should not maintain an action to have it canceled without joining the other party to it. 1 Pomeroy, Eq. J. § 114; 2 Story, Eq. J. (13th Ed.) 853; Story, Eq. Pl. §§ 76a, 138.

It is the joinder of two or more causes of action in one complaint where such joinder is not permitted, that makes a complaint demurrable, not the manner of such joinder. Whether the causes joined are separately stated, is immaterial. The question is not whether the rule of stating and numbering the causes of action separately has been observed, but whether two or more causes of action, which the statute does not permit to be joined, are in fact contained in the complaint. Bliss, Code Pleadings, §§ 123, 290; 412; Trowbridge v. Forepaugh, 14 Minn. 133, (Gil. 100.)

The question is whether the complaint states or attempts to state two causes of action. If it does, there is a misjoinder. The cause for the cancellation of the note and mortgage is under Laws 1879, ch. 66, § 6, and is an equitable one; that for the recovery of interest is under § 2 of the same Act and is strictly legal. The former is a cause which can only be determined by the judge, sitting as a chancellor; the latter is one to be determined by a jury. Guernsey v. American Ins. Co., 17 Minn. 104, (Gil. 83;) Stewart v. Carter, 4 Neb. 564; Henderson v. Dickey, 50 Mo. 161; Harrison v. Juneau Bank, 17 Wis. 340.

Under the statute in force prior to 1877, this court held that interest in excess of the legal rate, voluntarily paid, could not be recovered. Cornell v. Smith, 27 Minn. 132. The only object of Laws 1879, ch. 66, § 2, we think, was to change this rule. the intention been to provide for the recovery of every thing paid on a usurious contract, provision would have been made for the recovery of principal also. But that was not done. Provision for the recovery of principal and interest not exceeding the legal rate, was made only in case of payment on compulsion. We therefore think the intention was not to provide for the recovery of that which the contract might have lawfully exacted, but only that which it could not lawfully exact. There is therefore no cause of action stated for the recovery of money, because the \$2,280 paid as interest is less than ten per cent. on the \$14,500. The action was commenced in April, 1892, about one year and eleven months after the money was received.

White & Egelston, for respondents.

It is clear from the complaint that Holmer never had any interest in the note and mortgage, or proceeds of the same; that he was used solely for the purpose of evading the law. Holmer, then, is not a person sufficiently interested to be necessarily before the court, so that his relief, if any, can be determined, or his liability, if any, can be apportioned; for under the complaint, he has no liability whatever. 1 Pomeroy, Eq. J. § 114.

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There is but one cause of action stated in the complaint, viz. that the note and mortgage are usurious; from this fact arises all the relief asked. 1878 G. S. ch. 66, § 285, provides for the setting aside and vacating a judgment when procured by fraud, which according to defendant's argument, is an action which can only be determined by the Judge sitting as a chancellor, and further provides for restitution of any money or other property received by virtue of the fraudulent judgment during its existence, which latter would be one to be determined by a jury. A complaint under that statute was held to state but a single cause of action. Baker v. Sheehan, 29 Minn. 235.

Laws 1879, ch. 66, § 3, provides that the maker of a usurious bond, bill, note, conveyance or other contract shall have the right to recover from the original holder the amount of principal and interest paid him on the same. This certainly reaches beyond the mere payment of interest in excess of ten per cent. per annum. Scott v. Austin, 36 Minn. 460; Ormund v. Hobart, 36 Minn. 306.

The reliefs asked for by the plaintiffs are not inconsistent. They are, first, that the note and mortgage described in the complaint shall be declared null and void; second, that the same shall be ordered cancelled and given up; third, that all the money, whether as principal or interest, which has been received by the defendant from the plaintiffs upon the void contract, or note, or mortgage, there being no valid indebtedness for the money loaned, shall be recovered

DICKINSON, J. Appeal from an order overruling a demurrer to the complaint. It appears from the complaint that the plaintiffs are husband and wife; that, pursuant to an usurious agreement between them and the defendant, the latter loaned to the plaintiff Carolina Anderson, for the period of six months, the sum of \$14,500, for the use of which the plaintiffs gave their promissory note for the payment of the sum of \$16,000, with interest thereon at the rate of ten per cent. per annum, and secured the same by a mortgage of real property owned by the plaintiff Carolina; that pursuant to the agreement between these parties, and for the purpose of evading the usury law, the note and mortgage were made, on their face, in favor of one Holmer, who in fact had no interest

in the transaction, and he indorsed the note, and assigned the mortgage to the defendant, at the time of their delivery; that the plaintiff Carolina has paid \$4,600 of the principal, and \$2,280 as interest, and that she has demanded the repayment of the same. The relief sought is (1) that the note and mortgage be adjudged void, their enforcement enjoined, and their surrender compelled; and (2) the recovery by the plaintiff Carolina of the money so paid by her.

- 1. Holmer was not a necessary party, and his nonjoinder did not constitute a sufficient ground of demurrer. According to the complaint, he has no interest in the subject of the action, or in the relief sought, and never had any interest in the matter.
- 2. The defendant demurred specially to that part of the complaint upon which is based the claim of the plaintiff Carolina to recover back the principal and interest paid by her. If this part of the complaint sets forth a cause of action, it is one in favor of the plaintiff Carolina only, and is a different cause of action from that pleaded in favor of both the plaintiffs; and it may properly be demurred to, although it is not separately stated. Bass v. Upton, 1 Minn. 408, (Gil. 292.) We should therefore consider the sufficiency of the case stated to entitle Mrs. Anderson to recover the principal and interest paid by her. It does not appear from the complaint that the interest paid (\$2,280) exceeded the interest which had accrued at the time of such payment on the money loaned, (\$14,500,) computed at the rate of ten per cent. a year. interest at that rate up to the time of the commencement of the action would exceed the sum paid as interest, and it is not shown when the payment was made. Neither does the complaint show that the payment was not voluntarily made. The question then arises whether money voluntarily paid to the usurious creditor on account of the principal, or for interest, and not exceeding what would be the interest computed at the rate of ten per cent. a year, can be recovered back. It cannot be so recovered unless Laws 1879, ch. 66, § 2, gives a right of recovery. Cornell v. Smith, 27 Minn. 132, (6 N. W. Rep. 460.) Irrespective of the rule which requires a strict construction of statutes imposing a liability in the nature of a penalty, or subjecting to a forfeiture, this statute cannot be given the extended construction which would be neces-

sary to support the plaintiffs' claim of right, upon the facts alleged, to recover the principal or interest paid.

Such payment we must assume to have been made voluntarily. Section 1 of the statute cited prohibits the taking of more than ten per cent. interest. Section 2 provides that any person who "shall have paid" for interest "any greater sum or value than is above allowed to be received may * * recover, in an action against the person who shall have taken or received the same, the full amount of interest or premium so paid." does not authorize the recovery of the principal, if that has been voluntarily paid; and only those who have paid as interest a "greater sum or value than is above allowed to be received" (ten per cent.) can recover the "interest or premium so paid." so far as appears from the complaint, the plaintiff Mrs. Anderson is not entitled to recover the money paid, either on account of the principal or as interest. The provisions of the third section of the act, allowing a recovery from the original holder of negotiable paper, tainted in his hands with usury, of both the principal and interest paid by the maker to an innocent purchaser of such paper, affords no reason for a construction of the previous section different from that above indicated. In such case the payment is not properly voluntary. The innocent holder of such paper is, by the terms of the statute, entitled to recover notwithstanding the usury, and the maker is compellable to pay. Hence the statute gives him the right to recover from the person chargeable with the usury what he has paid pursuant to his obligation towards the innocent holder of the paper. The case is different where the payment has been made to the original party to the usurious contract. It is ordinarily optional with the debtor whether he will pay either principal or interest, and the necessity for statutory protection, by means of a right given to recover back money paid, is not the same as in the case of negotiable paper held by innocent purchasers. For these reasons we think that the demurrer should have been sustained as to this separate demand of Mrs. Anderson.

3. It is further pleaded as a general ground of demurrer to the complaint that two causes of action are improperly united. As already intimated, we are of the opinion that the plaintiffs seek to recover on two causes of action, which are separate, and which

cannot be properly joined, because, even though they may both be "connected with the same subject," they do not both "affect all the parties to the action," which is one of the statutory conditions of a joinder of separate causes of action. 1878 G. S. ch. 66, § 118, subd. 7. The cause of action for the cancellation of the usurious securities given by both the plaintiffs is one existing in favor of both. The right to recover the money paid by the wife is hers alone. Her husband is in no legal sense interested in it. It is a distinct cause of action in her favor alone. The order overruling the demurrer will be reversed.

Vanderburgh, J., did not take part.

(Opinion published 54 N. W. Rep. 1062.)

EDGAR P. INGLEE vs. HENRY T. WELLES et al.

58 197 84 381 53 197 85 444

Argued Jan. 18, 1898. Decided May 8, 1898.

Jurisdiction of "Parties Unknown."

Under Laws 1881, (Ex. Sess.) ch. 81, the fact that the named defendant was dead when the action was commenced will not prevent the court from acquiring jurisdiction to determine the rights of "other persons, or parties unknown," claiming an interest in the real estate described in the complaint.

Affidavit to Publish Summons.

Other objections to the affidavit for publication held not well taken.

Appeal by Wilber B. Godding and William A. Godding from an order of the District Court of Hennepin County, *Thomas Canty*, J., made September 17, 1892, denying their motion to open a judgment and permit them to defend.

On August 20, 1887, the plaintiff, Edgar P. Inglee, commenced an action in the District Court of Hennepin County against Henry T. Wells, Delia W. Godding and all other persons or parties unknown, claiming any right, title, estate, lien or interest in Lot twelve (12) in Block twelve (12) in Lennon & Newell's Addition to St. Anthony. The action was brought under 1878 G. S. ch. 75,

§ 2, and Laws 1881, (Ex. Sess.) ch. 81, to determine the adverse claims to the lot. The plaintiff held tax titles to it. mons and notice of Lis Pendens were published six weeks in the Saturday Evening Spectator. On October 1, 1887, the printer made affidavit that the District Court Summons, a printed copy of which is attached, was printed and published in said newspaper for six successive weeks, commencing on Saturday, August 27, 1887. tached to the affidavit was a printed copy of the summons and of the notice of Lis Pendens, cut from a newspaper. of Henry T. Wells was, on motion, stricken out of the case. he having sold his tax certificate to plaintiff after the action was commenced. On October 29, 1887, the court made findings in which it was stated that it had been made to appear to the satisfaction of the court by due and sufficient proofs, that due legal service of the summons in the action, together with notice of Lis Pendens, was had by publication pursuant to the order of the court, and that all the defendants were nonresident except Wells. On the same day judgment was entered in which it was also recited that due service by publication of the summons and notice of Lis Pendens had been made, pursuant to an order of the court, and adjudging plaintiff to be the owner of the lot.

On August 5, 1892, Wilber B. Godding and William A. Godding filed their affidavit stating that Delia W. Godding died intestate in September, 1861, seized in fee of the lot; that they were her only heirs at law, and had always resided at East Burke, Vermont, and did not hear, or have notice, of the pendency of this action until July 20, 1892. They moved the court to vacate the judgment and permit them to answer and show the invalidity of plaintiff's tax titles and to redeem the lot. The motion was denied and they appeal.

Little & Nunn, for appellants.

C. G. Laybourn and Kellogg & Laybourn, for respondent.

PER CURIAM. We are of the opinion that the proof of publication of the notice of *lis pendens* with the summons is sufficient; also, that the nature of the action, and the nonresidence of the named defendant, Delia W. Godding, sufficiently appeared from the affidavit for publication.

We are also of opinion that the mere fact that the named defendant was dead before the action was brought did not prevent the court from acquiring jurisdiction to determine the right of "persons or parties unknown" claiming an interest in the land described in the complaint.

These being all the objections to the judgment that are urged by the appellants, the order appealed from must be affirmed.

(Opinion published 55 N. W. Rep. 117.)

HERMAN DREWS et al. vs. Ann River Logging Co.

Argued April 18, 1898. Decided May 8, 1898.

Verdict Supported by the Evidence.

Held, in an action to recover damages for a breach of warranty in the sale of certain grain, that the verdict of the jury in plaintiffs' favor was supported by the evidence.

Rulings Reviewed.

Rulings of the trial court when receiving testimony, and when charging the jury, reviewed and disposed of.

Appeal by defendant, Ann River Logging Company, from an order of the District Court of Washington County, W. C. Williston, J., made August 26, 1892, denying its motion for a new trial.

The plaintiffs, Herman Drews and Albert Drews, copartners, in August, 1891, at Stillwater, bought of defendant, a corporation, about 3,300 bushels of rye raised by it, and then on its farm in Kanabec county, and which it was to deliver to plaintiffs on board the cars at Bronson, Minnesota. Defendant warranted the rye to be good and sound. Plaintiffs paid for it eighty cents per bushel, but it was found on arrival at Minneapolis to be wet and musty, and they brought this action to recover damages. They had a verdict May 17, 1892, for \$409.42. Defendant moved for a new trial, but was denied, and it appealed.

Clapp & Macartney, for appellant. Searles & Gail, for respondent.

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- Collins, J. Action to recover damages for a breach of warranty in the sale of a quantity of rye. The plaintiffs had a verdict, and the appeal is from an order denying defendant's motion for a new trial. It is claimed by counsel for appellant corporation that the verdict was not justified by the evidence; that the court erred in one of its rulings when receiving testimony in plaintiffs' behalf, and again erred when refusing to charge the jury as requested.
- 1. There was competent evidence produced upon the trial reasonably tending to sustain the verdict, and it cannot be disturbed. Such is our conclusion, after a careful examination of the testimony, as certified up from the trial court.
- 2. One of the plaintiffs was permitted to testify, over defendant's objection, as to what had been said to him by Davis, a bookkeeper in defendant's office. When this plaintiff learned that the rye was not as warranted, several days after it had been delivered by defendant and had been shipped to market, he called at the office to see defendant's manager, McKusick, from whom he McKusick was not in, whereupon plaintiff purchased the same. stated to Davis the damaged condition of the grain, and that, unless handled and removed from the cars at once, it would lose The latter replied, according to the witness, "I would do the best, the same as if it was your own." Without discussing the claim of respondents' counsel that, from the testimony, it clearly appeared that Davis had full authority to act for and bind defendant, we must say that this testimony was of no consequence, and could have had no bearing on the issues, which were-First, was the grain warranted by defendant? and, second, if so, did it comply with the warranty?

The defendant's liability as for breach of warranty was fixed long before this conversation, and we fail to see in what way the testimony received could have influenced the verdict.

3. The rye was raised upon a farm near the village of Bronson, and the trade was made at Stillwater, several miles distant. The rye was then on the farm, but, according to the pleadings and proof, was to be delivered to plaintiffs free on board cars at Bronson railway station. The substance of the instruction to the jury, requested by defendant's counsel and refused by the court, was that, if the grain was as represented when the trade was made

at Stillwater, the warranty was satisfied, notwithstanding it was to be delivered on board the cars at the station; and if it deteriorated in value before delivery, without fault on defendant's part, the loss would fall upon plaintiffs.

As before stated, the contract was to sell and deliver on board the cars at Bronson station, and the transaction at Stillwater amounted to nothing more than an executory agreement for sale and delivery. An agreement, no matter when or where made, to sell and deliver good, sound rye free on board cars at a railway station, is not performed in any of its parts until good, sound rye is delivered on the cars.

Order affirmed.

Vanderburgh, J., did not sit. (Opinion published 54 N. W. Rep. 1110.)

CHARLES E. COTTRELL vs. CITIZENS' SAVINGS BANK OF DETROIT et al.

Argued April 20, 1898. Decided May 8, 1898.

Reformation of Deed Refused.

Assuming, without deciding, that under some circumstances, and in an action brought for that purpose against the beneficiaries of the trust, a deed of assignment for the benefit of creditors may be corrected and reformed,—on the ground of mutuality of mistake,—so as to conform to the intentions of the immediate parties thereto, such correction and reformation cannot be had if it appears that the beneficiaries may have lost valuable rights, and will not be placed in statu quo in case the relief demanded is granted.

Appeal by plaintiff, Charles E. Cottrell, from an order of the District Court of Hennepin County, Seagrave Smith, J., made November 19, 1892, sustaining a demurrer to the complaint.

The facts appear in Mackellar v. Pillsbury, 48 Minn. 396. After the decision of that appeal, this action was commenced by the assignor against all his creditors and the assignee, S. A. Booth, to reform the deed of assignment, on the ground of mutual mistake. The defendant Citizens' Savings Bank of Detroit, Michigan, one of the creditors, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment ordered dismissing the action.

C. S. Jelley, for appellant, cited Rogers v. Castle, 51 Minn. 428; Benson v. Markoe, 37 Minn. 30; Buckley v. Patterson, 39 Minn. 250; and Gerdine v. Menage, 41 Minn. 417.

Carman N. Smith and A. H. Hall, for respondents, cited Mackellar v. Pillsbury, 48 Minn. 396; Baker v. Harlan, 3 Lea, 505; Scull v. Reaves, 3 N. J. Eq. 131; and Messonnier v. Kauman, 3 John. Ch. 3.

Collins, J. This appeal is from an order sustaining a general demurrer to the complaint. The deed of assignment involved is that considered in Mackellar v. Pillsbury, 48 Minn. 396, (51 N. W. Rep. 222,) this court there holding that the instrument could not be amended and reformed on the ex parte application of the assignor and assignee to the District Court, so as to conform in its provisions to their alleged intention, when the trust was created by the one, and accepted by the other. The plaintiff is the assignor, Cottrell, while the defendants are the assignee, Booth, and, it is alleged, all of Cottrell's creditors. The effort is now being made, by means of this action,—as it was upon the ex parte application before mentioned,—to amend and reform the deed by inserting a clause requiring all creditors to file releases of their claims in order to participate in dividends, thus to convert a common-law assignment for the benefit of creditors, as regulated by Laws 1876, ch. 44, into an assignment under the insolvency act, Laws 1881, ch. 148, as amended.

From the complaint it appears that the assignment was made, and the assignee had entered upon the discharge of his duties, more than two and a half years prior to the bringing of this action. It is alleged that it was the intention and agreement of the plaintiff assignor to make, and the intention and agreement of the defendant assignee to accept, a deed of assignment of all of plaintiff's property not exempt from execution for the benefit of all of his bona fide creditors who would file releases of their claims against him, as pro-

vided by chapter 148, supra, and amendments thereto; that the deed was made by plaintiff, and accepted by the assignee defendant, in the belief that it contained a clause requiring the filing of such releases as a condition to participation in its benefits, and that the clause was accidentally, and through mistake, omitted from the deed. The mistake is shown to have been mutual on the part of the assignor and assignee. All of the creditors named as defendants, save one, had filed their claims with the assignee, and were demanding a distribution of the assets in his hands,—about \$10,000 in money,—before this action was commenced.

Counsel for appellant insists upon treating the deed of assignment, for the purposes of reformation, on the ground of mutuality of mistake, as if it were an ordinary conveyance of real property. ing him upon his own ground, and avoiding any expression of opinion as to whether the mistake can be regarded as mutual, it having been made by the assignor and assignee solely, or whether, under any circumstances, a deed of assignment may be corrected so as to conform to the intention of the immediate parties thereto, it is apparent that, to obtain a decree correcting and reforming the one now under consideration, it should be shown that the beneficiaries of the trust can be placed in statu quo, or at least that their rights will not be seriously affected, in case of its reformation. does not appear, the relief sought for should be denied. The deed had been executed, and the assignee had been discharging his duties more than thirty months, when this suit was commenced. which belonged to the creditors at the inception of the trust proceedings have long ago been lost to them. All of the acts of the assignee have been performed under, and governed by, the law pertaining to an assignment at common law, as such assignment has been regulated by the statute of 1876. Valuable powers and privileges conferred upon an assignee by the insolvency act of 1881, to be freely used for the benefit of creditors, are now gone, and it was one of these-the right to attack the validity of a sale of property by the assignor in contemplation of insolvency, and with a view of giving a forbidden preference to one of his creditors—which the assignee unsuccessfully attempted to assert in the Mackellar Case. His right or power to maintain that action on one of the grounds chosen was denied because he was not an assignee under the statute

last referred to. The creditors who have filed their claims have done so under the assumption that the assignment was at common law, as modified and regulated by the act of 1876; and, while it is not alleged in the complaint, it is fairly inferable therefrom that the assignee has reduced the entire estate to cash, and has executed the trust, except as to a distribution of the money among those who have shown themselves entitled to it. The interested parties—the beneficiaries of the trust—have relied upon the assignment as made, and could not assume or be restored to their original status. For this, if for no other reason, the deed should not be corrected or reformed. Nor could the deed of assignment be treated as a pleading in a civil action, and amended by motion.

Order affirmed.

VANDERBURGH, J., absent, took no part. (Opinion published 54 N. W. Rep. 1111.)

LOUISA E. DOUGLAS et al. vs. CHARLES F. HERMS et al.

Submitted on briefs April 10, 1893. Decided May 8, 1893.

Lease Construed.

The conditions found in a certain lease of real property, respecting the right of the landlord, at his election, to declare the same terminated, the leasehold interest forfeited, and to maintain an action to enter upon and take possession of the premises, considered and construed.

Landlord's Right of Re-entry for Condition Broken, not Waived.

Held, upon such construction, that the landlord had not waived or lost his right to elect to recover possession as for nonpayment of rent by forbearing to collect the rent promptly as it became due, thus allowing the tenant to habitually be in default, or by paying taxes upon the premises which should have been paid by the tenant, as provided in the lease.

Appeal by defendants, Charles F. Herms, Fred Heckrich, John B. Prim and Philip M. Wirth, from an order of the District Court of Hennepin County, *Frederick Hooker*, J., made January 28, 1893, denying their motion for a new trial.

On June 2, 1884, the plaintiffs, Louisa E. Douglas and three others, owned the premises Nos. 513 and 515 Washington Avenue North, in Minneapolis, then unimproved, and on that day they leased the same to defendant Charles F. Herms for the term of one hundred years, he to pay all taxes and assessments and the yearly rent of \$720, in quarterly payments in advance. If default should be made in the payment of rent or taxes the owners were authorized to declare the lease ended and all buildings, fixtures and improvements forfeited to them, and to enter and take possession. Or the owners, if they so elected, were authorized to pay the taxes, and the money so paid and all rent in arrears were to be a lien on the buildings, fixtures and improvements, and they were authorized to fore close such lien and sell the buildings, fixtures and improvements to pay such taxes and rent.

Herms erected a brick building on the premises, costing over \$6,000, and leased parts of it to the defendants Prim and Wirth. On September 2, 1892, Herms, being insolvent, made a general assignment to defendant Heckrich of all his nonexempt property in trust for his creditors. On October 1, 1892, \$1,843.05 was due for rent, and \$831, for taxes paid by the owners, besides interest, and they on that day, declared the lease ended and the buildings, fixtures and improvements forfeited, and made complaint before W. H. Mills, a Justice of the Peace, under 1878 G. S. ch. 84, § 11, to remove the defendants as overholding tenants. After a hearing, the Justice held that complainants had waived their right to re-enter, and could only foreclose, and refused restitution. They appealed to the District Court. The action was there tried on December 16, 1892, before the court without a jury, and findings were made that complainants were entitled to restitution, and directing judgment that they be put into possession. The defendants moved the court upon the record, files and a settled case, for a new trial, but were denied, and they appeal to this court.

Ankeny & Irwin, for appellants.

The remedy for forcible detainer cannot be applied where the parties have in the lease, provided one or more other and different remedies. It is enough that they have made such agreement. Gluck v. Elkan, 36 Minn. 80.

On May 30, 1891, there was a default in the payment of taxes of over \$800, and plaintiffs paid them. They thereby elected to abandon the first remedy, and to stand upon the lien and its foreclosure, instead of declaring the lease forfeited. Newton v. Leary, 64 Wis. 190; Langley v. Ross, 55 Mich. 163; Pickard v. Kleis, 56 Mich. 604; Bauer v. Knoble, 51 Mich. 358.

Where two or more remedies are so provided, the court will lean to the one least likely to inflict injury. This property before the commencement of this action, came by the assignment into the custody of the law, and under the control of the court. If this action be sustained, the estate will be utterly lost. It is idle to say that the assignee or creditors may still have six months in which to redeem under 1878 G. S. ch. 75, § 33. That statute cannot be made to apply to an action brought under ch. 84, § 11. Byrane v. Rogers, 8 Minn. 281, (Gil. 247;) Whitaker v. McClung, 14 Minn. 170, (Gil. 131.)

Geo. P. Douglas, for respondents.

The plaintiffs were authorized to declare the lease canceled, and to take possession of the property by means of an action under 1878 G. S. ch. 84, § 11. Gluck v. Elkan, 36 Minn. 80; Suchaneck v. Smith, 45 Minn. 26.

It is provided that the lessor's lien may be foreclosed as mortgages are foreclosed. This cannot be construed to mean that the lessors having a lien, must elect to foreclose it as mortgages are foreclosed. Such a construction would render the clause for cancellation and reentry a nullity. The parties made no such contract. There is nothing inconsistent in the two remedies. Dyckman v. Sevatson, 39 Minn. 132; Coles v. Yorks, 31 Minn. 213; Smith v. Miller, 49 N. J. Law. 521.

We do not understand that there are any equities to be adjusted in this action. The assignee and creditors stand in the same position as the original lessee. Burrill, Assignments, 621.

COLLINS, J. Plaintiffs, being the owners of vacant city property, leased the same, in 1884, to defendant Herms for a long term of years.

The latter was to pay the stipulated rent quarterly, in advance, and was also to pay all taxes which might be assessed or levied thereon. He erected a substantial building upon the property. On September 2, 1892, being insolvent, he executed a deed of assignment for the benefit of his creditors, thereby conveying his leasehold interest and all other rights in and to the premises to defendant Heckrich, who still remains the assignee under the insolvency laws of this The other defendants herein are tenants in possession under leases made by Herms prior to his assignment. It appears that, for some years before the assignment, default had been made in the quarterly payments of rent, so that \$1,843.05, exclusive of interest, was then due. The tenant had also neglected to pay taxes, which on May 30, 1891, amounted to \$831, and this sum plaintiffs paid to the proper authorities on that day. From time to time during the period of default, partial payments had been made by the tenant, and accepted by plaintiffs, but at no time had the rent been paid in full, although often demanded. The present action was brought before a justice of the peace under the forcible entry and unlawful detainer act, 1878 G. S. ch. 84, § 11, and from his decision an appeal was taken to the District Court, in which judgment of restitution was ordered. This appeal is from an order refusing defendants a new trial.

The result here must be made to turn upon our construction of a portion of the lease. It was therein provided that if default should be made by the tenant in his payments of rent and taxes at the times and in the manner specified, the landlords should have the option and election to declare the lease terminated absolutely, and all of the tenant's rights and interest thereunder, and all of his rights and interest in and to all buildings and improvements upon the premises, forever ended and forfeited, and should also have full right and power to enter into and upon, and to take possession of, the premises, including all of said buildings and improvements; or, at the election of said landlords, they could pay the taxes, instead of declaring the lease forfeited; and in either case the amount of all rents in arrears, and the amount of all taxes paid, should become a lien on the leasehold estate, and on all buildings and improvements, prior and paramount to all other liens or claims of every

nature, which prior and paramount lien might be foreclosed in the same manner as a mortgage upon real property.

Counsel for appellants do not claim that, if the conditions first mentioned with respect to the forfeiture of the tenant's rights and interests in case of default stood alone in the lease, this action would not be maintainable; but their position is that, having been indulgent to the tenant during the period of four years next preceding his assignment, allowing him to default habitually in his quarterly payments of rent, and, further, by having paid taxes in the year 1891 which the tenant should have paid, they have abandoned their right to declare a forfeiture, and to take possession of the entire premises, and have chosen and elected to rely solely upon their lien, and the power and authority conferred to foreclose the same as a real-estate mortgage. The contention is that there are two distinct and independent remedies in case of default provided for in the lease, one of which has been selected, and that by this selection the landlords have lost the right to summarily dispossess the defendants under the provisions of section 11, supra. It is true that when the first default occurred, in 1888, probably, these plaintiffs could have exercised their rights, and arbitrarily ejected Herms and his tenants They seem to have been lenient, and to have from the property. accepted partial payments when not required so to do. 1891, finding a large sum due for taxes which should have been paid by the tenant, they were again forbearing, and, paying the amount, refrained from exercising the right of forfeiture. be possible that, as to past defaults in payment of both rents and taxes, strict construction of the terms of the lease would require us to hold that by means of this payment of taxes the landlords elected to rely solely upon their lien, and waived and lost the right to recover possession. But, if this be so, the bare fact that subsequently to the payment of taxes the tenant was permitted to repeatedly default, and the landlords frequently accepted partial payments, as for rent, cannot be given the same effect, any more than if, at the time the taxes were paid, the tenant had met all of his obligations under the lease, and had liquidated all past indebtedness. election, if it was made so as to deprive these plaintiffs of the remedy they are now pursuing, of which we have doubt, cannot be regarded

as an election for the future, any more than the acceptance of rent from month to month, and while a tenant is in default in the performance of some of the conditions of a lease, will be held to have relieved him from the duty of performance in the future. Gluck v. Elkan, 36 Minn. 80, (30 N. W. Rep. 446.) According to the conditions of the lease before mentioned, the plaintiffs had a prior and paramount lien for rent in arrears at all times, which they could, if they chose, foreclose as a mortgage upon land. also authorized to pay delinquent and unpaid taxes, and the amount of the same was a lien of the same general character. But certainly. as to rents which became due after the plaintiffs paid the taxes, there is nothing which evidences an intent to rely solely upon their lien. That they were indulgent and accommodating, allowing the default to continue, and the amounts due to steadily increase, simply failing to put the tenant out, cannot be regarded as proof of their election to waive the right to declare a forfeiture or to take possession, as provided for in the lease. A lessor of real property will not be estoppeled to claim the right to possession of the premises for nonpayment of rent simply because he permits default to be made, and to continue, as to such payments.

Order affirmed.

VANDERBURGH, J., did not sit. (Opinion published 54 N. W. Rep. 1112.)

CHARLES A. KRAUSE et al. vs. Morris Thomas et al.

Argued April 21, 1898. Decided May 8, 1898.

Answer Construed.

A certain part of defendants' answer examined, and held not to constitute a defense or counterclaim to the cause of action set forth in the complaint to which it referred.

Appeal by defendants, Morris Thomas and T. A. Sheridan, from an order of the District Court of St. Louis County, J. D. Ensign, J., made June 14, 1892, sustaining a demurrer to the counterclaim in defendants' answer.

v.53 M. -14

The plaintiffs, Charles A. Krause and Miah H. Hulett, were partners doing business under the name Fond du Lac Brownstone Co., and in 1891, sold and delivered to defendants at Duluth a large quantity of curbing and cut stone to be used by defendants in carrying out their contract with that City, for grading, paving, curbing and improving Second street between Kentuckey and Thirteenth avenues. This action was to recover \$2,403.70 unpaid balance of the price. The answer, for counterclaim, attempted to state a special contract with plaintiffs, under which the stone was furnished, and to state its violation by plaintiffs, and resulting damages to defendants.

To this answer plaintiffs demurred, and the trial court sustained the demurrer, and defendants appealed.

J. C. McClure and Wm. B. Phelps, for appellants.

Spencer & Kennedy, for respondents.

Collins, J. Action to recover a balance said to be due to plaintiffs on account of curbing and cut stone sold and delivered to Four causes of action were set out in the complaint, defendants. the second referring to curbing stone only. The answer alleged the making of a contract between defendants and the proper authorities of the city of Duluth, whereby the former agreed to do certain street work, in accordance with plans and specifications prepared by the city engineer, and that thereafter plaintiffs and defendants entered into a written contract, made a part of the answer, under which the latter were to furnish necessary curbing stone for the street work, according to such plans and specifications, to be delivered free on board cars at the quarry, to be shipped as directed by defendants, and to be paid for at a stipulated price per lineal There was also a clause in the contract that all of the stone was to be delivered by the 1st day of the following August. part of the answer was devoted to the second cause of action, and this part was demurred to on the ground that neither a defense nor a counterclaim to said second cause of action was set forth therein.

We pass by the first paragraph of that portion of the pleading covered by the demurrer with the remark that there was no apparent connection between the curbing mentioned in plaintiffs' second cause of action, for which they were endeavoring to recover the contract price, and the defective curbing referred to as having been refused and rejected by defendants. It was not alleged that it was a part of the curbing on which the second, or any other, cause of action was founded.

The paragraphs in the answer immediately following the first, in respect to the increased wages of laborers during the latter part of October and during the month of November, in reference to the shortening of hours constituting a day's work in the month last named, and the hindrance and delay of the work, may be disposed of by saying that, even if the defendants could counterclaim and recover by reason of these matters, it is nowhere averred that they directed the plaintiffs when to deliver the stone on the cars, or when to ship the same, or that the stone was not delivered and shipped precisely as ordered by defendants; nor is there an averment that all was not delivered by August 1st, as provided for in the contract. In many ways these allegations were defective and demurrable.

By bringing forward a portion of the answer, so that it may do duty in connection with the defense and counterclaim in question, it appears that, according to the plans and specifications furnished by the city engineer, each stone was to be dressed smooth and even on top; the face of each was to be dressed smooth and even to the depth of ten inches below the top; the back of each was to be thus dressed to the depth of six inches; the ends were to "be dressed smooth, so as to make close joints through the full thickness of the stone, for a distance of not less than ten inches down from the top, and all joints to be made close-fitting." Referring to these requirements, the answer stated that "the curbing was not in accordance with the plans and specifications, in that they were not dressed smooth, so as to make close joints, and the same could not be made close-fitting." Conceding that it would be possible to discover, from the balance of the allegation, in what manner, and to what extent, defendants were injured and damaged by reason of the defects mentioned,—and of this we have doubt,—it is obvious that it did not appear from the pleading that the ends of the stones were not dressed smooth, so as to make close joints through the full thickness of the stone "for a distance of not less than ten inches down from the top, and all joints made close-fitting." This was

all that was required by the plans and specifications, and that part of the answer in which an attempt was made to set forth noncompliance with the same failed to contain an allegation that the ends of the stone were not dressed smooth to the depth of ten inches from the top, so as to make close joints. Below this space of ten inches, close-fitting joints were not required.

As appellants' counsel omit to refer to, or make any claim for, the averments in the answer concerning the execution and delivery of a bond to the city to restore and replace the curbing should it prove imperfect and defective, we do not feel called upon to discuss the same.

Order affirmed.

Vanderburgh, J., took no part in this case.

(Opinion published in 54 N. W. Rep. 1114.)

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AMERICAN BUILDING & LOAN ASSOCIATION vs. ORVILLE A. STONEMAN et al.

Argued April 24, 1893. Decided May 9, 1803.

A Judgment as Evidence.

Rule applied that, as against strangers to it, a judgment is evidence only of its own existence, and not of any of the facts upon which its recovery was based.

No Damages upon the Facts Pleaded.

American B. & L. Ass'n v. Waleen, 52 Minn. 23, followed, to the effect that if a mortgagee, holding a bond of mere indemnity against paramount liens, has foreclosed, and bid in the mortgaged premises for the full amount of his debt, he has no cause of action on the bond.

Appeal by defendant, A. B. Latham, from an order of the District Court of Hennepin County, Wm. Lochren, J., sustaining a demurrer to his answer. He and Orville A. Stoneman executed a bond to the plaintiff, the American Building & Loan Association, similar to those described in Pioneer Savings & L. Co. v. Bartsch, 51 Minn. 474, and American B. & L. Ass'n v. Walcen, 52 Minn. 23.

Judgment vas obtained upon mechanics' liens as in the first of these cases, and the plaintiff had foreclosed its mortgage and bid in the property for the full amount due, as in the second.

- I. A. Barnes and Savage & Purdy, for appellant.
- C. M. Cooley and Rea & Hubachek, for respondent.

MITCHELL, J. This was an action upon a bond in all respects substantially the same as those recently considered by this court in Pioneer Savings & L. Co. v. Bartsch, 51 Minn. 474, (53 N. W. Rep. 764,) and in American B. & L. Ass'n v. Waleen, 52 Minn. 23, (53 N. W. Rep. 867.) This appeal is from an order sustaining a demurrer to the answer of defendant Latham, who was one of the sureties on the bond. Under the familiar rule that a demurrer reaches back to the first defective pleading, this demurrer should have been overruled, for the reason that the complaint does not state a cause of action. It has been decided, in the cases already cited, that a bond like this is merely one of indemnity against paramount mechanics' liens. It was therefore incumbent on the plaintiff to allege facts showing that there were such liens, and that it was damnified thereby. All that the complaint alleges in that respect is that certain parties filed statements of account, in which they claimed such liens on the premises; that subsequently one of them brought an action to enforce his lien, to which the other lien claimants, the mortgagor, and this plaintiff, the mortgagee, were made or became parties defendants, and in which judgment was duly rendered adjudging that such claimants had liens on the premises superior to the lien of plaintiff's mortgage. But Latham was no party to that action, and there is no allegation that any notice was given him of its pendency, or that plaintiff ever called on him to assume its The judgment was therefore, as to defendant, res inter alios acta, and evidence only of the fact of its recovery, and not of the facts which it assumes to decide.

2. The demurrer should have been overruled for another reason. The answer contained several separate defenses. It is a rule of pleading that if a general demurrer is interposed to the whole of a complaint or answer containing several causes of action or defenses, on the ground that it does not state a cause of action or

defense, the demurrer must be overruled as not well taken, if any one of the counts is good. The answer in this case contained at least one good defense. It is alleged that, intervening the filing of the lien claims and the rendition of judgment in the action for their enforcement, the plaintiff foreclosed his mortgage, and bid in the premises for more than the full amount of the debt secured thereby. Under the doctrine of American B. & L. Ass'n v. Waleen, supra, this satisfied plaintiff's claim in full, and hence he has not been damaged, and consequently has no cause of action on the bond. As this question has been so recently passed on in the case referred to, it is unnecessary to discuss it again. It is unnecessary to consider the sufficiency of any of the other defenses interposed.

Order reversed.

DICKINSON, J. I concur in the result on the first ground stated in the opinion.

VANDERBURGE, J., absent, took no part. (Opinion published 54 N. W. 1115.)

MATTHEW GALLAGHER vs. GERMANIA BREWING Co.

Argued April 28, 1893. Decided May 9, 1893.

Set-Off in Actions against Corporations.

The demands of stockholders individually cannot be interposed as equitable set-offs to a demand against the corporation, even though the plaintiff is insolvent.

Appeal by plaintiff, Matthew Gallagher, from an order of the District Court of Hennepin County, Charles M. Pond, J., made April 6, 1892, overruling his demurrer to the complaint of the interveners.

Herman A. Westphal in February, 1890, filled the ice house of defendant, Germania Brewing Company, at Keegan's Lake, with ice for which it agreed to pay him \$965. He also sold and delivered

to it in July, 1890, 37,000 pounds of ice for \$37. The corporation paid Westphal thereon \$163.74. Westphal afterwards, and before March 1, 1892, made a general assignment of all his nonexempt property to the plaintiff, in trust to pay his creditors. On the lastmentioned day the assignee commenced this action against the defendant, Germania Brewing Company, to recover the balance of \$838.26. The defendant answered that it had paid the claim in full, and also that it held demands against Westphal which it would set off on the trial.

On March 21, 1892, Jacob Barge and John Vander Horck intervened in the action and filed their complaint in intervention, stating that the Germania Brewing Company was organized as a corporation in 1887, and acquired real and personal property. July 21, 1890, it sold and conveyed all its property, business and good-will to the Minneapolis Brewing & Malting Company, another corporation, and ceased to carry on business, and has since existed only to wind up its affairs. That Barge owns one-half and Vander Horck the other half of the stock of the Germania Brewing Com-That Vander Horck recovered judgment September 19, 1891, against Westphal for \$1,178.94, and that Barge recovered judgment March 10, 1892, against Westphal for \$2,267.73. both judgments remain wholly unpaid and in force, but unsecured by lien or levy or otherwise. That Westphal has been insolvent since January 27, 1890, and wholly without property or means, and that the estate assigned to the plaintiff will not pay a dividend of one per cent. upon Westphal's debts. The interveners prayed that one-half of the Westphal claim against the Germania Brewing Company be applied upon each of their judgments, and for such other relief as should seem equitable.

The plaintiff demurred to this complaint in intervention, on the ground that it stated no facts entitling the interveners to the relief demanded, or to any relief in the action. The trial court overruled the demurrer, and allowed plaintiff ten days to answer. He appeals from the order.

Freeman P. Lane and Wm. H. Briggs, for appellant.

The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Lewis v. Harwood, 28 Minn. 428; Horn v. Volcano Water Co., 13 Cal. 62; Kansas & C. P. R. Co. v. Fitzgerald, 33 Neb. 137; Smith v. Gale, 144 U. S. 509; Bennett v. Whitcomb, 25 Minn. 148.

The interveners must, by averment, show that their rights are involved in the cause which is being litigated, and that they are entitled to the relief which they ask, and the facts authorizing intervention, and the grounds thereof, should be fully stated in the complaint or petition. Smith v. Allen, 28 Texas, 501; Nenney v. Schluter, 62 Texas, 327; Harlan v. Eureka Mining Co., 10 Nev. 92.

At the time of the commencement of this action the interveners owned the entire stock of the defendant corporation, and did, at the time their respective judgments were obtained, and when the assignment was made. It is claimed that the interveners are the actual and real parties in interest in this suit, because they are stockholders in the defendant company, and that whatever plaintiff recovers they will personally be obligated to pay. The mere fact that the interveners each owned an undivided one-half of the stock in the defendant corporation did not make them parties in interest within the meaning of the statute.

Gretchen & McHugh, for respondents.

Barge and Vander Horck are the real parties defendant; they will necessarily be called upon, to pay each one-half of any amount recovered by plaintiff. This presents a remarkably strong case for the intervention of a court of equity. It would be manifestly unjust to compel Barge and Vander Horck to pay this claim of plaintiff, and then attempt the impossibility of collecting their judgments against Westphal. There is a natural equity that cross demands should be set off against each other and the balance only recovered. As to the objection that Barge and Vander Horck are not defendants, we urge that equity will always regard the real parties in interest independent of the record. The general rule in equity as well as in law is, that joint, and several debts can not be set off against each other. But while at law, the rule admits of

no exception, and only the parties to the record will be regarded, a court of equity will, in case of insolvency, regard the real parties, those ultimately to be affected by the decree, and allow a setoff of demands in reality mutual, although prosecuted in the name of others nominally interested. 2 Story, Eq. J. § 1437a; Birdsall v. Fischer, 17 Minn. 100, (Gil. 76;) Blake v. Langdon, 19 Vt. 485; Hamilton v. Van Hook, 26 Texas, 302; Hobbs v. Duff, 23 Cal. 629; Brewer v. Norcross, 17 N. J. Eq. 225; Pond v. Smith, 4 Conn. 297; Simson v. Hart, 14 John. 62; Becker v. Northway, 44 Minn. 61; Seligmann v. Heller Bros. Clothing Co., 69 Wis. 410.

The right to have these judgments set off against plaintiff's claim being sustained, the right to intervene in this action follows almost as a matter of course. Becker v. Northway, 44 Minn. 61; Lewis v. Harwood, 28 Minn. 428; Bennett v. Whitcomb, 25 Minn. 148.

The plaintiff, as assignee of one Westphal under a MITCHELL, J. general assignment for the benefit of creditors, brought this action to recover for goods sold and delivered by his assignor to the defendant corporation. Jacob Barge and John Vander Horck intervened, and set up in their complaint that they owned, and for nearly two years had owned, (each one-half,) all the capital stock of the defendant, no other person but themselves having any interest in the stock or property of the corporation; that each of them had a valid and unsatisfied judgment against Westphal upon a cause of action which accrued before the assignment to plaintiff; that Westphal was, and for over two years had been, utterly insolvent; and that his estate, of which plaintiff is the assignee, was so hopelessly insolvent that it was insufficient to pay even the expenses of administering the assignment. The relief sought was that their claims against Westphal might be allowed, in equal amounts, as equitable set-offs to the claim of the plaintiff against the defendant corpora-From an order overruling a demurrer to the complaint, the tion. plaintiff appeals, his contention being-First, that Barge and Vander Horck had no such interest in the litigation as to entitle them to intervene; second, that their claims cannot be set off against a claim (against the corporation, because a corporation is a legal entity, entirely distinct from its stockholders. These two propositions amount L really to the same thing, for, if Barge and Vander Horck cannot

set off their claims against that of plaintiff against the corporation, they have no such interest in the subject of litigation as would entitle them to intervene; on the other hand, if their claims are proper equitable set-offs, their right to intervene for the purpose of setting them up is very clear. The case is certainly a novel one, for we doubt whether an instance can be found in the books where stockholders ever attempted to set up their several equities by way of set-off to claims against the corporation. Of course, the want of a precedent is by no means controlling with courts, especially in administering equitable relief; but it would seem that, if the relief here asked was consistent with legal or equitable principles, some case would be found where it had been granted.

The facts of the present case appeal to a natural sense of justice, for while, by fiction of law, a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property. Hence, if interveners cannot set off their claims, the practical result is that Westphal's estate will collect its entire claim out of what is really their property, while the estate is at the same time indebted to them on claims of greater amount, which they will wholly lose because of Westphal's insolvency; but, as has been often said, hard cases are liable to make bad law.

The right of equitable set-off is, of course, not derived from, or dependent upon, statute, but rests upon a distinctly equitable doctrine, which courts of equity have applied on certain well-recognized equitable grounds, the object being to effect a clear equity and prevent irremediable injustice; and it may be stated as a general rule that, whenever necessary to accomplish that end, the courts will permit an equitable set-off, although the debts accrued in different rights; as, for example, by allowing a separate debt to be set off against a joint debt, or, conversely, a joint debt against a separate debt. They will also disregard the nominal parties to the record. and consider the real parties in interest; as, for example, when the assignor of a chose in action sues for the benefit of the assignee, or a trustee for the benefit of the cestui que trust. Hence, had the plaintiff's claim been a joint one against the interveners, there would have been no doubt of their right to set off their separate claims against it, for insolvency is well recognized as a distinct equitable

ground for allowing such a set-off. But such a case is not analogous to the present. To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders, and to treat it as a mere association of individuals who are the real parties in interest. In dealing with the rights of creditors, and the obligations existing between a corporation and its shareholders by reason of their contract of membership, undoubtedly the courts often find it necessary to consider the real parties in interest as the individual shareholders; but it may be laid down as a rule that, except in such cases, it has been found absolutely essential, for the administration of justice, to treat a corporation as a collective entity, without regard to its individual shareholders. In no other way can the title to corporate property be kept free from complication and uncertainty. The transferable nature of stock in a corporation is also a good reason why the theory of a corporate entity should be preserved, and why it is necessary to discriminate sharply between corporate rights and obligations and those of shareholders personally. If the rights or liabilities of a corporation could be affected by the acts of the stockholders, except when acting in the corporate name, or if shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders, it can easily be seen into what confusion and chaos corporate affairs would inevitably fall.

Inasmuch as the two interveners own all the stock of this corporation, the facts of this case seem comparatively free from embarrassments, and the contention of respondent quite plausible. But, suppose there were fifty other stockholders, (which would not alter the principle,) what would be the result? Could interveners then interpose their claims as set-offs, and, if so, could they do so to the full amount of their claims, or only in the proportion which their shares bore to the whole capital stock? And, if the former, would they have a claim for the excess against the corporation, or a right to call on the other stockholders for contribution?

Again, the right of set-off, if any exists, must be mutual. Hence, if stockholders can interpose their individual demands as set-offs to a demand against the corporation, it follows that a defendant can

set up demands against the individual stockholders as set-offs to demands in favor of the corporation.

Illustrations might be multiplied indefinitely to show that to recognize any such right would result in the worst sort of complications, and that the only safe or sound rule is to adhere strictly, in such cases, to the doctrine of a corporate entity distinct from the individual stockholders.

What means, if any, the interveners might have had, or may hereafter have, of protecting themselves, it is not now our business to inquire, but we are clear that their claims against plaintiff's assignor are not the subjects of equitable set-off to a claim against the defendant corporation.

Order reversed.

Vanderburgh, J., absent, took no part.

(Opinion published 54 N. W. Rep. 1115.)

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HENRY J. GUDE ct al. vs. Exchange Fire Ins. Co. of New York.

Argued April 26, 1893. Decided May 9, 1893.

Agency-Evidence Insufficient to Establish.

Evidence held insufficient to show that the person through whom plaintiffs obtained the policy in suit was the agent of the defendant, or anything more than a mere insurance broker.

Appeal by plaintiffs, Henry J. Gude and Joseph C. Gude, from an order of the District Court of St. Louis County, O. P. Stearns, J., made September 23, 1892, denying their motion for a new trial.

The defendant, the Exchange Fire Insurance Company of New York, on January 12, 1891, in consideration of \$75, insured the plaintiffs for one year against loss by fire not exceeding \$2,500, on their elevator and feed mill situated on a leased site on the St. Paul & Duluth Railroad right of way in Duluth. The policy contained a condition that it should be void if the subject of the insurance be personal property and be incumbered by chattel mortgage. There was in fact a chattel mortgage to the Duluth and Western Elevator Company for \$4,000 on the building, given by

plaintiffs October 6, 1890. The property was casually destroyed by fire October 2, 1891. Notice was given and proofs of loss furnished, but defendant refused to pay on account of this undisclosed mortgage. The plaintiffs replied that they obtained the insurance from O. A. Case, defendant's agent, and at that time disclosed to him the incumbrance, and that it was given for a part of the purchase price they had agreed to pay for the building. They alleged that the omission from the policy of all mention of the mortgage was due to the neglect, inadvertence, mistake or fraud of defendant or its agent, and not to any concealment, neglect or default of the plaintiffs.

The issues were tried June 15, 1892; and the principal question of fact litigated was whether O. A. Case was the agent of defendant so that his knowledge of the mortgage was notice thereof to it. The evidence on this point is stated in the opinion. On motion of the defendant, the Judge instructed the jury to return a verdict for defendant on the ground that there was no evidence in the case that it had any knowledge or notice of the mortgage. Plaintiffs excepted. The verdict was entered. A case was settled, signed and filed. On it a motion for a new trial was made, but was denied. From that denial this appeal is taken.

James Spencer, for appellants.

In November, 1890, the plaintiffs owned the Star Elevator, situated on leased ground, and subject to a mortgage for \$4,000. was used for storing and handling grain, and had in it the usual machinery for operating a grain elevator. While the building was undergoing repairs, one O. A. Case called upon the plaintiffs and solicited insurance on this building and machinery. He mentioned the names of some of the companies he represented, and among others the Exchange Fire Insurance Company of New York, the The rate of the premiums was fixed, and it was arranged that the plaintiffs would insure the building and machinery with Case. The amount of insurance was fixed at \$8,200. this conversation Case was informed that the building was located upon leased land, and that there was a chattel mortgage against it for \$4,000. He gave them what is known as a carpenter's risk on the building for thirty days until the repairs should be com-

pleted, and at the same time took their application for their regular insurance on the building and machinery, the policies for which were to be delivered when the repairs should be completed. repairs were completed about January 1, 1891, and soon afterwards Case returned and delivered to plaintiffs the policy in suit. The bill for the premiums came also from him, and the amount thereof for this policy, \$75, was paid by plaintiffs to him. also furnished the balance of insurance on the building in several other companies, and delivered the policies therefor to plaintiffs, and was paid the premiums by them. The policies were not all delivered at the same time, but were all delivered by Case at different times after January 1, 1891. When this policy was delivered, one of the plaintiffs looked at it, to see if the amount was correct, and ascertaining that it was, put it away without reading it, and did not see it again until after the fire.

The contention of the plaintiffs is, that Case was the agent of the defendant, and that his knowledge of the existence of the mortgage, was the knowledge of, and notice to, the defendant of its existence; and that having issued and delivered this policy with such notice, it waived the conditions in the policy making it void because mention of the mortgage was not indorsed on the policy.

The plaintiffs, for the purpose of proving that Case was the agent of the defendant, and that the defendant had notice of the existence of the chattel mortgage at the time, and before the policy was issued, proved that Case solicited this insurance in behalf of the defendant; that he examined the property; that he fixed the rate of insurance; that he stated to the plaintiffs that he represented the defendant; that he took the application for the insurance at that time; that he talked with the plaintiffs about the insurance afterwards; that he went away, and in a short time afterwards delivered to plaintiffs the policy in question, concededly issued by this defendant, and was paid the premiums therefor. The application was oral. Case was the only person plaintiffs had any conversation with in reference to the insurance. He took the applications, wrote them out if they were written, (the plaintiff never made or signed any written application,) submitted them to defendant; the company accepted them as made out and presented by him. Under this state of facts there can be no doubt that he

had authority from the company, or from some one who represented the company, and was its agent, to do what he did in that regard. Kausal v. Minnesota Farmers' Mut. Fire Ins. Co., 31 Minn. 17; Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545; Newman v. Springfield F. & M. Ins. Co., 17 Minn. 123, (Gil. 98;) St. Paul Fire & M. Ins. Co. v. Shaver, 76 Iowa, 282; National Mechanics' Bank v. National Bank of Baltimore, 36 Md. 5; York County Bank v. Stein, 24 Md. 447; Henderson v. Mayhew, 2 Gill, 393; Central Pa. Telephone Co. v. Thompson, 112 Pa. St. 118; Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117; Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 434; Chase v. People's Fire Ins. Co., 14 Hun, 456; Davis v. Lamar Ins. Co., 18 Hun, 230.

And whether Case was only a canvassing or soliciting agent for the defendant, made no difference in this case. Notice to a soliciting agent is notice to his principal. Heath v. Springfield Fire Ins. Co., 58 N. H. 414; Liverpool & L. & G. Ins. Co. v. Van Os, 63 Miss. 431; Hamilton v. Aurora Fire Ins. Co., 15 Mo. App. 59.

And he was the agent of the company notwithstanding the stipulation to the contrary in the policy. Lamberton v. Connecticut Fire Ins. Co., 39 Minn. 129; Whited v. Germania Fire Ins. Co., 76 N. Y. 415; Eilenberger v. Protective Mut. F. Ins. Co., 89 Pa. St. 464.

If the defendant, having knowledge of the existence of the chattel mortgage, issued and delivered this policy and received the premiums therefor, and allowed the plaintiffs to believe that they were insured, it waived the condition contained in the policy that would otherwise have rendered it void, and is estopped from setting up this defense. Wilson v. Minnesota Farmers' Mut. Fire Ins. Ass'n, 36 Minn. 112; Richmond v. Niagara Fire Ins. Co., 79 N. Y. 230; Haight v. Continental Ins. Co., 92 N. Y. 51; Germania Fire Ins. Co. v. McKee, 94 Ill. 494; Bennett v. North British & M. Ins. Co., 81 N. Y. 273; Smith v. Commonwealth Ins. Co., 49 Wis. 322; Michigan State Ins. Co. v. Lewis, 30 Mich. 41; Oakes v. Manufacturers' Ins. Co., 135 Mass. 248.

Billson & Congdon, for respondent.

This is an action on an insurance policy for the recovery of \$2,500. The sole defense is that at the time the policy was issued,

the property insured was covered by a chattel mortgage for \$4,000, and the existence of such mortgage was not endorsed upon the policy in any way, and that the defendant had no knowledge of the mortgage, and that therefore the policy is, and always was, void by reason of the condition therein contained.

There is nothing in the evidence to show that Case had ever acted for the defendant in any other transaction, or that the defendant ever knew that Case was claiming to act for it in this transaction, or that the defendant ever delivered the policy in suit directly to Case, or received directly from him the premium thereon, or that the defendant ever knew of the existence of Case. The question in this case in no wise involves the manner of the waiver by the corporation, but solely the power of the person making the alleged waiver to bind the corporation in any manner.

The burden of proof was on the plaintiffs to establish Case's agency, and proof is logically defined as a sufficient reason for assenting to a proposition. This conclusion must not rest on mere conjecture. It is not enough that the evidence leaves the matter in equilibrio as to whether Case was or was not defendant's agent. The evidence on that question must not be left to guesswork. Orth v. St. Paul, M. & M. Ry. Co., 47 Minn. 384. Case may have obtained the policy from the defendant through some third person, without being known to defendant in this or any other transaction. He may have obtained the policy as one in the employ of plaintiffs, or as an insurance broker. There is, of course, no pretense that Case's knowledge bound the defendant, if he assumed to act as plaintiffs' agent, nor can it be so claimed in the event that he acted as an insurance broker.

There is a distinction between an insurance agent and an insurance broker; the latter being one who procures insurance and negotiates between insurers and insured. An insurance broker is regarded as the agent for the insurer as to the premium, but for nothing else. He is agent for the insured in effecting the policy, and in everything that has to be done in consequence of it. The conclusion, therefore, to be drawn is, that the knowledge of the broker as to any matter connected with the effecting of the insurance is not to be imputed to the company. East Texas Fire Ins.

Co. v. Brown, 82 Tex. 631; Security Ins. Co. v. Mette, 27 Ill. App. 324; Criswell v. Riley, 5 Ind. App. 496; Allen v. German-Am. Ins. Co., 123 N. Y. 6.

The doctrine that an insurance broker is the agent of the insurer, for the purpose only of collecting the premium and delivering the policy, and in all other respects is the agent of the insured, has become text book law. 2 Am. & Eng. Encyc. of Law, 595; Mechem, Agency, § 931; Goldin v. Northern Assurance Co., 46 Minn. 471.

MITCHELL, J. This was an action on a fire insurance policy. The defense was that, at the time the policy was issued, the property insured was covered by a mortgage,—a fact which, by the conditions of the policy, rendered it void. The reply was that the defendant accepted the risk with knowledge of the mortgage, and thereby waived the condition of the policy. It appeared that plaintiffs procured the insurance through one Case, who knew of the mortgage; hence the real issue was whether Case was defendant's agent in soliciting the insurance and procuring the applications for it, so that his knowledge of the mortgage would be that of the defendant; and the only question here is whether the trial court should have left that question to the jury, instead of directing, as he did, a verdict for defendant.

The evidence was as follows: Case came to the plaintiffs in Duluth, and solicited insurance on their property, saying that he represented several companies, among which he named defendant. That plaintiffs verbally authorized him to secure and place insurance on the property to the amount of several thousand dollars, leaving it to his judgment in what companies to place it. sequently Case delivered to plaintiffs, among other policies in other companies, the policy in suit, signed by N. R. Thompson & Co., of Minneapolis, as agents for the defendant, and collected the premium, which was subsequently received by defendant. placing this insurance the plaintiffs had no transaction with any one but Case. That this is the only policy they ever had with That the name of Case does not appear on the the defendant. policy, as agent or otherwise. There is no evidence that Case ever acted, or assumed to act, for the defendant in any other transaction. Neither is there anything to show, except so far as may be v.53 m. -15

inferred from the facts above stated, that defendant ever knew that Case was claiming to act for it in this transaction, or that defendant delivered the policy directly to Case, or received the premium directly from him, or in fact knew of his existence. this state of the evidence the court was right in directing a ver-The burden was on the plaintiffs to prove that Case was the agent of the defendant, with authority, express, implied, or apparent, to waive this condition of the policy. Of course, the mere statement of Case that he represented the defendant was no evidence of that fact. Giving to the evidence the construction most favorable to the plaintiffs, and assuming that he personally presented to the defendant an application for this insurance, and received the policy directly from, and paid the premium directly to, the defendant, it does not appear that he had any relations whatever with the defendant other than an insurance broker, who, in his own behalf, solicits insurance, submits applications to the company, and, if accepted, receives the policy for the insured, and on its delivery collects the premium, and pays it over to the comnany.

Such a broker might be deemed the agent of the company for the purposes of delivering the policy and collecting the premium, but nothing more. It is true that Case might have been the agent of the defendant, but the evidence, as far as it goes, is quite, or even more, consistent with the hypothesis that he was a mere broker: and it was incumbent on plaintiffs, on whom was the burden of proving the agency, to go further than this. We think circumstances were wholly wanting from which the jury would have been warranted in finding the fact of agency. The case of Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n, 31 Minn. 17, (16 N. W. Rep. 430,) relied on by plaintiffs, is not in point. that case an agency to procure applications for insurance was an admitted or established fact, and the question was as to the extent of the authority, implied or apparent, of such an agent.

Order affirmed.

Vanderburgh, J., absent, took no part.

(Opinion published 54 N. W. Rep. 1117.)

Application for reargument denied May 23, 1893.

WALTER VAN BRUNT vs. ELIZABETH F. GORDON.

Submitted on briefs May 1, 1893. Decided May 9, 1898.

Contribution among Joint Debtors.

Rule applied that where one of several, who are jointly, or jointly and severally, liable on contract for the same debt, pays more than his share, he is entitled to contribution from the others to reimburse him for the excess thus paid.

Appeal by defendant, Elizabeth F. Gordon, from a judgment of the District Court of St. Louis County, O. P. Stearns, J., entered April 18, 1892, for \$3,156.81.

On August 1, 1879, the plaintiff, Walter Van Brunt, and the defendant rented of Aaron Mendenhall of Chester County, Pennsylvania, five-sixths, and of William E. McLaren of Cook County, Illinois, one-sixth, of lots one (1,) two (2,) three (3,) and four (4,) in block six (6) in the Industrial Division of Duluth, for the term of fifteen years. They agreed to pay as rent for the premises, all taxes and assessments that should be levied or assessed thereon during the term, and after five years to pay annually six per cent. of the market value of the property, exclusive of improvements, and to build a dock thereon and dredge the west water front to a depth of sixteen feet below low-water mark. The plaintiff alone paid all the taxes and the rent to July 1, 1889, amounting to \$4,771.69, when the leases were determined and canceled by agreement of the parties thereto. This action was brought to recover of the defendant one-half of the money so paid, with interest. The issues were referred for trial to H. F. Greene, Referee, who heard the evidence, and made report directing judgment for the plaintiff. was entered accordingly, and defendant thereafter moved for a new trial. This motion was dismissed because not made in due She now appeals from the judgment and from the order dismissing her motion for a new trial.

James Spencer, for appellant.

No action at law of any kind can be sustained between tenants in common of real estate for contribution or damages, by one who

has expended money in making necessary repairs, paying rents or taxes, or purchasing outstanding titles in which the other has refused to join. These parties were tenants in common pure and simple. Our statute has so made them; they would have been joint tenants at common law. 1878 G. S. ch. 45, § 44.

There was no contract or agreement of any sort between the parties, or pretense of any, nor is there any statutory provision, creating liability or providing for personal actions between them to recover contribution or damages for payment by either for the benefit or preservation of the common property. Mumjord v. Brown, 6 Cowen, 475; Doane v. Badger, 12 Mass. 65; Coffin v. Heath, 6 Met. 76; Calvert v. Aldrich, 99 Mass. 74; Pentz v. Clarke, 41 Md. 327; Stedman v. Feidler, 20 N. Y. 437.

Nor can the covenants in the leases made by this defendant to the lessors, in which she agreed to pay the rents and taxes, be construed as a provision made for the plaintiff's benefit, because this covenant to pay was not for his benefit. It was made for the benefit of the lessors, and though such payment if made by her might have incidentally resulted in his benefit, it would not aid him. Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219; Vrooman v. Turner, 69 N. Y. 280; Garnsey v. Rogers, 47 N. Y. 233; Wheat v. Rice, 97 N. Y. 296.

These payments were made by the plaintiff voluntarily, and not only that, but they were paid in discharge of his personal liability, and were due from him, and he had the exclusive possession of the common property. He is not entitled to recover either for the rents or taxes. Railroad Co. v. Commissioners, 98 U. S. 541; Carew v. Rutherford, 106 Mass. 1; Beach v. Vanderburgh, 10 John. 361; Supervisors of Onondaga v. Briggs, 2 Denio, 26; Jones v. Wilson, 3 John. 434.

Walter Ayers, for respondent.

These leases appear to have been purely speculative ones on the part of the lessees, and it does not appear that either of the lessees ever entered into actual possession of the property or derived any benefit from it. Not a dollar of revenue was ever derived by either party from the demised premises or the leasehold interests.

The payments were all made in pursuance of a joint contractual obligation to the lessors named in the leases, and where one of two persons who are jointly liable upon an obligation, pays or satisfies more than his proportionate share of the debt or obligation, he is entitled to a contribution from his co-obligor. This is so elementary that we need not discuss it at large. 3 Pomeroy, Eq. J. § 1418, and cases cited.

The question of demand upon, or refusal by, the defendant is immaterial; but if it were not, the plaintiff's husband was her agent for all purposes connected with the leases. *Place* v. *Johnson*, 20 Minn. 219, (Gil. 198.)

This action was begun in July, 1891, the case was referred to a referee, and judgment ordered by him March 18, 1892. On April 18, 1892, judgment was duly entered. No further steps whatever were taken by the defendant until September 3, 1892, when, upon a motion for a new trial, the court declined to consider the same, upon the ground that the motion was not made in seasonable time.

MITCHELL, J. The short facts are that plaintiff and defendant took leases of certain real estate for a term of years, in which they covenanted and agreed to pay the lessors a certain rent, and to pay the taxes on the premises during the term. The premises were unimproved and unproductive, the leases being apparently purely speculative. During the life of the leases the plaintiff paid all the taxes and rent, and he now brings suit for contribution to compel defendant to pay her share.

Counsel for defendant has made an exhaustive brief upon the law as to the rights and liabilities of cotenants between each other, growing out of their mere connection with the common property, irrespective of any contract between themselves or with third persons; but, with all deference to the learned counsel, we think this is entirely foreign to the facts of this case. These taxes and rent constituted a debt which plaintiff and defendant were jointly obligated to pay, just the same as if they had bought the property, and given their joint note for the purchase money; and their rights are to be determined by precisely the same rules as if the obligation had been contracted by persons who never bore to each other the relation of tenants in common. The fact that they were tenants in

common of the property for which this joint obligation was contracted has nothing to do with the case. The simple facts are that both were equally bound by their contract to pay certain sums of money, and one of them has paid the whole. The familiar rule applies that the one who has paid more than his share is entitled to contribution from the other to reimburse him for the excess so paid, and thus equalize their common burdens. This rule is based on the maxim that equality is equity.

Judgment affirmed.

VANDERBURGH, J., absent, took no part. (Opinion published 54 N. W. Rep. 1118.)

Application for reargument denied May 28, 1893.

JAMES J. McDonald vs. George W. Clark et al.

Argued by appellant, submitted on brief by respondent, May 2, 1893. Decided May 9, 1893.

Attached Real Estate-Release of.

A motion, under Laws 1885, ch. 110, to vacate an attachment, cannot be made after final judgment has been entered in the action.

Appeal by Frank W. Clark, from an order of the District Court of Aitkin County, G. W. Holland, J., made September 2, 1892, refusing to release certain real estate from attachment.

On December 24, 1888, the plaintiff, James J. McDonald, commenced an action upon contract in the District Court of Aitkin County, against George W. Clark and C. C. Sutton, defendants, and obtained a writ of attachment, which was on the same day levied by the sheriff upon lots one (1) and two (2) in block twelve (12) in the Village of Aitkin, then owned by the defendant George W. Clark. On the same day, but after the levy, George W. Clark conveyed the property to his brother Frank W. Clark. The summons was personally served, and the defendants appeared by attorney, and from time to time obtained stipulations extending the time to answer until September 1, 1889, when their attorney in

formed the plaintiff's attorney that defendants had abandoned all intention of making any defense to the action.

On January 18, 1889, the defendant George W. Clark was adjudged insolvent, and a receiver of his property was appointed under Laws 1881, ch. 148. The receiver commenced an action against Frank W. Clark to set aside the deed to him, and that action was determined April 12, 1892, adversely to the receiver. The plaintiff McDonald then on May 2, 1892, entered up judgment in this action against George W. Clark and C. C. Sutton, and caused a writ of execution to be issued and was about to sell the attached property when Frank W. Clark, the grantee, made this motion June 15, 1892, under 1878 G. S. ch. 66, § 160, as amended by Laws 1885, ch. 110, to vacate the attachment as dormant. His motion was denied September 2, 1892, and he appeals.

Everett Hammons, for appellant.

A. Y. Merrill, for respondent.

MITCHELL, J. Laws 1885, ch. 110, provides that "whenever any attachment has been or shall be levied, and more than three years have or shall have elapsed without judgment being entered in the action, any person having any interest in the attached property, although not a party to the original action, may move for the release of any such property from the lien of such attachment; and if it shall appear, to the satisfaction of the court, that no proceedings have been had in said action for a period of three years, or, from other evidence, that said action has been abandoned, said attachment shall be vacated, and the lien thereof released."

We think it very clear that a motion under this statute cannot be made after the entry of judgment.

All its provisions evidently presuppose that the action has not been prosecuted to final judgment. It is not to be presumed that the legislature contemplated the vacation of the attachment after its lien had become merged in that of the judgment. The whole statute was aimed at cases where the action has been actually abandoned, or where the plaintiff has unreasonably delayed in prosecuting it to final judgment, leaving the attachment an apparent, or a mere provisional or inchoate, lien on the property. In this case final judgment had been entered before appellant made

his motion to vacate, and consequently the motion was properly denied, notwithstanding more than three years had elapsed between the levy of the attachment and the entry of the judgment.

Order affirmed.

VANDERBURGH, J., absent.

(Opinion published 54 N. W. Rep. 1118.)

M. B. ROLLINS vs. WM. W. NoLTING.

Submitted on briefs May 4, 1898. Decided May 9, 1893.

Jury Disagreeing, Discharged.

Held, that in this case there was no abuse of discretion in discharging the jury because of their inability to agree.

Jurors' Fees to be Paid in Advance.

In justice's court a party calling for a jury must pay the jurors' fees into court in advance, and, if he refuses to do so, the justice may proceed to try the case without a jury.

District Court Always Open.

Under 1878 G. S. ch. 66, § 244, as amended in 1868, any issue or question of law alone, such as an appeal from a justice of the peace on questions of law alone, may be brought on for hearing before the court at any time.

Appeal by defendant, William W. Nolting, from a judgment of the District Court of Stevens County, Calvin L. Brown, J., entered September 21, 1892.

The plaintiff, M. B. Rollins, made complaint before a Justice of the Peace under 1878 G. S. ch. 84, § 11, that defendant detained from him lots sixteen (16) and seventeen (17) in block two (2) in the Village of Morris, in violation of the terms of a lease thereof by plaintiff to defendant, and asked restitution. Issue was joined, a jury impaneled and the evidence of the parties submitted, August 22, 1892; but the jury were unable to agree, and after being out all night, were discharged by the Justice. The defendant then demanded that another jury be impaneled, but refused at that time, to advance the second jury fee. The Justice refused to order the

Sheriff in attendance to make a list of jurors or to issue a venire, unless the defendant should first deposit the jury fee in court. This he refused to do, and the Justice proceeded to try the case The defendant offered no evidence and left the without a jury. The plaintiff submitted his evidence and the Justice rendered judgment for restitution and \$31.74 costs. Defendant on August 25, 1892, appealed to the District Court on questions of law Return was at once made and filed, and on August 27, 1892, the plaintiff noticed the appeal for trial before the District Court at Chambers on September 6, 1892. On that day defendant appeared and objected that the cause was not noticed for trial at either a general or special term, and could not be brought to trial at Chambers without his consent. The objection was overruled, the Court saying: "1878 G. S. ch. 65, §§ 118, 123, are intended to hasten, not to delay the trial of appeals; to fix a time beyond which the appellant can not permit his appeal to remain unprosecuted except for cause shown." Defendant excepted to the ruling. appeal was then tried and the judgment appealed from affirmed. From this judgment defendant appeals to this court.

S. A. Flaherty, for appellant.

Spooner & Taylor and H. T. Bevans, for respondent.

MITCHELL, J. The record shows that the case was given to the jury about five o'clock in the evening; that they were out all night, and until seven o'clock the next morning, when, upon their informing the justice that they had not agreed on a verdict, he discharged them. The provisions of 1878 G. S. ch. 65, § 60, and ch. 84, § 10, authorizing a justice to discharge a jury because of their inability to agree, are, we apprehend, but declaratory of the pre-existing rule that if, after a jury has been out a reasonable time, the court, in the exercise of a sound discretion, is satisfied they cannot agree, he may discharge them.

1. Even assuming that the exercise of this discretion is reviewable in any case, and that the abuse of it could ever be taken advantage of by a party in a civil action, we are quite clear that there was in fact no abuse of it in this instance. Where, in a case like the present, a jury had failed to agree on a verdict after being out fourteen hours, including a night, the justice had certainly reasonable

ground for concluding that they would be unable to do so unless forced to it under unreasonable pressure and constraint.

2. The jury having been thus discharged, the defendant demanded of the justice to direct the proper steps to be taken for issuing a venire for a new jury. The justice then called on the defendant for the jury fees prescribed by 1878 G. S. ch. 70, § 30, as amended by Laws 1891, ch. 83. The defendant declined to advance the jury fees at that time, because as yet no jurors had been selected or venire issued. The justice thereupon held that, because of this refusal to deposit the requisite jury fees, the defendant was not entitled to a jury, and proceeded to the trial of the cause without one. In this the justice was right.

The plain meaning of the statute is that the party calling for a jury must in the first instance pay their fee. Of course, if he succeeds in the action he is entitled to recover it from the other party as disbursements. And, while the statute nowhere provides in express words when the fee shall be paid, yet we think it clearly implies that payment should be made in advance. It should accompany the demand for a jury, or at least be made on request of the justice; and until the amount is deposited the justice is not required to take any steps towards issuing a venire. A refusal to pay the fees when thus demanded amounts to a waiver of the right to a jury trial. Randall v. Kehlor, 60 Me. 37.

It can hardly be necessary to add that if there be a mistrial because of the disagreement of a jury, and a party calls for a second one, he must also pay its fees.

3. The defendant appealed to the district court on questions of law alone, and, after the return had been filed in that court, the plaintiff noticed the case for argument before the court at chambers. This the defendant assigns as error. 1878 G. S. ch. 66, § 244, as amended by Laws 1868, ch. 90, provides that, "in addition to the general terms, the district court is always open " " for the hearing and determination of all matters brought before the court or judge, except the trial of issues of fact." This language is certainly broad enough to include issues of law, and all questions of law alone. A comparison of the original section with the amended one plainly shows that the amendment of 1868 was intended to accomplish this very end, and set at rest whatever doubt might have

previously existed as to what matters might be brought on for hearing before the court at chambers. 1878 G. S. ch. 65, §§ 118, 123, (which were in existence long before the amendment of 1868,) are in no way inconsistent with this view. As was said in *Chesterson v. Munson*, 27 Minn. 498, (8 N. W. Rep. 593,) these provisions were intended to hasten, and not delay, the trial of appeals from justice's court.

Judgment affirmed.

Vanderburgh, J., absent, took no part. (Opinion published 54 N. W. Rep. 1118.)

S. A. McGeagh vs. P. N. Nordberg.

Argued May 5, 1893. Decided May 9, 1893.

Waiver of Trial by Jury.

The waiver of a jury when a cause is called for trial is a waiver of jury trial only of the issues then formed, and not an agreement to waive it as to all new and different issues that may thereafter be formed under amended pleadings.

Prepayment of Jury Fee.

The municipal court act provides that "the party demanding a jury in a civil action shall be required to advance and pay * * * a jury fee of \$3, and unless such jury is demanded, and such fee paid, upon the calling of the calendar on the first day of the term at which the same is set for trial, it shall be considered to be, and the same shall be, waived, and said action tried by the court." Hcld, that an appellant who assigns as error the denial of his demand for a jury trial should make it appear from the record that his demand was accompanied by payment of the jury fee into court.

Appeal by defendant, P. N. Nordberg, from an order of the Municipal Court of the City of Minneapolis, Stephen Mahoney, J., made September 21, 1892, denying his motion for a new trial.

A. B. Darelius, for appellant, cited Biggs v. Lloyd, 70 Cal. 447; Elliott v. Caldwell, 43 Minn. 357; Marcotte v. Beaupre, 15 Minn.

152, (Gil. 117;) Lace v. Fixen, 39 Minn. 46; St. Paul & Sioux City R. Co. v. Gardner, 19 Minn. 132, (Gil. 99;) Deering v. McCarthy, 36 Minn. 302.

Robert Stratton, for respondent, cited Conneau v. Geis, 73 Cal. 176; Adams v. Corriston, 7 Minn. 456, (Gil. 365;) Stadler v. Hertz, 13 Lea, 315; Bailey v. Joy, 132 Mass. 356; Venine v. Archibald, 3 Colo. 163; Randall v. Kehlor, 60 Me. 37.

MITCHELL, J. This was an action to recover for services as agent or broker in securing a loan for defendant. In his original complaint the plaintiff declared on an express contract to pay a speci-When the case was called, both parties waived a jury, and the trial was commenced before the court. the plaintiff offered evidence of the reasonable value of his services, which was excluded as not being admissible under the pleadings. Thereupon the plaintiff asked and obtained leave to amend his complaint so as to allege an implied contract to pay what the services were reasonably worth, and the cause was continued over The cause, being again at issue upon the amended pleadings, and being "on the calendar of the May 17, 1892, general term of the court, which date was the first day of that term for setting cases, was called to be set for a day certain. The defendant. in open court, demanded a trial by jury, which the court refused to grant," to which refusal defendant excepted. The cause was continued over until the June term, when, upon the case being again called, "the defendant demanded, in open court, a trial by jury, which the court refused, to which refusal the defendant duly excepted," and thereafter, upon a day set, the cause was tried by the court without a jury. The principal question in the case is whether the court erred in refusing defendant a jury trial.

It will be observed that the record is silent as to the ground upon which defendant's demand was refused. It is a familiar rule that, to entitle an appellant to a reversal, the error assigned must appear affirmatively of record, as every reasonable presumption is in favor of the regularity of the proceedings of the court below. If the court had refused defendant's demand on the ground that the waiver of a jury trial of the issues under the original pleadings

amounted to a waiver of a jury trial of the issues subsequently formed under the amended pleadings, we have no doubt this would have been error. The issues under the two sets of pleadings were essentially different. All that defendant waived was a jury trial of the issues then formed, and not of any and all other issues that might possibly be thereafter formed under amended pleadings, and which he could not anticipate. He might well be willing to waive a jury trial of the issue as to the existence of a special contract, and yet not be willing to leave the question of the reasonable value of plaintiff's services to the court. The case is very different from one of a mere formal amendment of pleadings, which leaves the issues the same.

But for anything that appears of record, defendant's demand might have been refused on an entirely different ground.

Section 13 of the municipal court act of Minneapolis provides: "The party demanding a jury in any civil action shall be required to advance and pay to the clerk of said court, on the first day of the term at which such action is set for trial, a jury fee of three dollars; and unless such jury is demanded, and such fee paid, upon the calling of the calendar, on the first day of the term at which the same is set for trial, it shall be considered to be, and the same shall be, waived, and said action tried by the court." The record fails to show that defendant had paid, or offered to pay, the requisite jury fee, and the trial court may have rightfully denied his demand on that ground. The power of the legislature to require the prepayment of a reasonable jury fee as a condition to entitle a party to a jury trial, and to provide that the failure to do so shall amount to a waiver of a jury, is undoubted. Adams v. Corriston, 7 Minn. 456, (Gil. 365.)

The other assignments of error, having reference to the competency of certain evidence, and the sufficiency of the evidence to sustain the findings, contain nothing worthy of special mention. We think no one of them is well taken.

Order affirmed.

VANDERBURGH, J., absent, took no part.

(Opinion published 55 N. W. Rep. 117.)

Application for reargument denied May 23, 1893.

STATE ex rel. James Hart et al. vs. Common Council of City of Duluth et al.

Argued April 25, 1893. Decided May 9, 1893.

Removal from Municipal Office Reviewable on Certiorari.

Where the power of a municipal body to remove from office is not discretionary, but only for cause, after notice and hearing, the proceedings are judicial in their nature, and may be reviewed on certiorari.

Review of Common Council Proceedings, Limited.

On such review the court will inspect the record to see whether the body had jurisdiction, and kept within it, and whether the charges preferred were sufficient in law, and will examine the evidence, not for the purpose of weighing it, but to ascertain whether it furnished any legal and substantial basis for the removal.

Same—Their Proceedings, How Tested.

Such bodies being essentially legislative and administrative, their proceedings, even when judicial in their nature, are not to be tested by the strict legal rules which prevail in courts of law. If they keep within their jurisdiction, and the evidence furnishes a legal and substantial basis for their decision, it will not be disturbed for mere informalities or irregularities which might amount to reversible error in the proceedings of a court.

"Sufficient Cause" for Removal Defined.

"Sufficient cause" means "legal cause," and must be one that specially relates to and affects the administration of the office,—one touching the qualifications of the officer, or his performance of its duties.

Charges, How to be Stated.

While the charges need not be stated with the formal exactness required in pleadings in courts, yet they should contain a specification of facts constituting a cause for removal, with reasonable precision, sufficient to inform the incumbent of the particular grounds upon which the charges are based.

Same-Their Sufficiency is a Question of Law.

The sufficiency and reasonableness of the charges are questions of law for the court.

Duluth Charter Construed.

The city charter of Duluth vests the power of removing the fire commissioners from office exclusively in the common council, and a resolu-

tion of that body preferring charges against such commissioners, and fixing a time and place of hearing, is not one which requires the approval of the mayor.

Charges Held Insufficient.

The charges in the case considered, and held insufficient.

Certiorari issued February 20, 1893, by this court on the relation of James Hart, Jr., and Theodore M. Helinski to the Common Council of the City of Duluth and Frank Burke, Jr., City Clerk, to certify and return to this court the record and proceedings, on the removal of relators from the office of Fire Commissioners under Sp. Laws 1887, ch. 2, subch. 11, § 4. The respondents made return April 3, 1893, setting forth a copy of the charges against the relators, and of the proceedings of the Common Council thereon, together with a copy of all the evidence (taken by a shorthand reporter) given upon the hearing before the Council.

B. C. Rude and A. L. Thurman, for relators.

The charges in this case were of the most general, uncertain and indefinite character. Not a single act or omission of these relators was specified with sufficient particularity to enable them to know, for what particular act they were to be tried. When an officer can be removed only for cause after a hearing, the charges must specify time, place and person, or give other particulars so as to enable the accused fully to know the particular acts or omissions of duty of which he is accused. People ex rel. v. Therrien, 80 Mich. 187; People ex rel. v. Fire Commissioners, 72 N. Y. 446; State v. McGarry, 21 Wis. 496; People ex rel. v. Nichols, 79 N. Y. 582; State ex rel. v. Chamber of Commerce, 20 Wis. 63; Meech v. Lee, 82 Mich. 274; Field v. Commonwealth, 32 Pa. St. 478; State ex rel. v. Smith, 35 Neb. 13.

Certiorari is the remedy in such cases where, the alleged vacancy not having been filled, quo warranto or mandamus will not lie. The writ of certiorari was held applicable in cases identical with the one at bar, in State v. Pritchard, 36 N. J. Law, 101; Dullam v. Willson, 53 Mich. 392; People v. Myers, 57 Hun, 587, 58 Hun, 604; State v. Mayor, etc., of Millville, 53 N. J. Law, 362; State v. Board of Police Com'rs, 49 N. J. Law, 170; Andrews v. King, 77 Me. 224.

J. D. Holmes, for respondents.

By Sp. Laws 1887, ch. 2, subch. 8, § 4, and subch. 11, § 4, the Legislature vested the power of removal of city officials, in the Common Council. When investigating charges against a city official with a view to removal from office, the Common Council do not act as a judicial body, nor do they act, or attempt to act, in a judicial Nor are their acts judicial in their nature. their action in these matters partake of the nature of a criminal trial or procedure, nor are they acting in any sense as a court of impeachment, or bound by rules governing such courts or bodies. whole matter, manner of procedure, conduct of the investigation and final action vests solely in the sound discretion of the body. They have power to remove for "sufficient cause." What constitutes sufficient cause is a matter of fact to be determined by the body after investigation.

The courts of this country are not agreed as to whether the power of removal from office for official misconduct, is judicial in its nature or administrative, but we submit, that under the provisions of the Constitution and the City Charter the acts and proceedings of the Common Council in removing relators from office were administrative and not judicial. State v. Doherty, 25 La. Ann. 119; Patton v. Vaughan, 39 Ark. 211; State v. Oleson, 15 Neb. 247; State v. Hawkins, 44 Ohio St. 98; People v. District Court, 6 Colo. 434; Donahue v. County of Will, 100 Ill. 94; Keenan v. Perry, 24 Texas, 253; State v. Frazier, 48 Ga. 137.

It is now the settled law of this State that legislative, ministerial or administrative acts of a municipal corporation will not be reviewed on certiorari. In re Wilson, 32 Minn. 145; Lemont v. County of Dodge, 39 Minn. 385; Christlieb v. County of Hennepin, 41 Minn. 142; State v. Mayor of St. Paul, 34 Minn. 250; Moede v. County of Stearns, 43 Minn. 312.

There is no force in the objection that the resolution passed January 18, 1893, directing notice to be given to relators, had not on January 19, 1893, when the service was made, any force or effect, as the same had not then been signed by the Mayor. It did not require the signature of the Mayor to give it effect and validity. Sp. Laws 1887, ch. 2, subch. 3, § 1; subch. 8, § 4; subch. 11, § 4.

The power of removal from office being vested solely in the Common Council, the Mayor has no power over, or control of, any of their proceedings, when they are acting in the capacity of a board or body in investigating charges against a city official with a view of removal from office, if the charges are sustained.

It is not requisite that the charges should be drawn with the formal exactness of pleadings in a court of justice, nor is it necessary that the proceedings should be conducted with the degree of exactness which is required upon a trial for criminal offenses in an ordinary court of justice. People ex rel. v. Thompson, 94 N. Y. 451; 1 Dillon, Mun. Corp. (3d Ed.) § 255; People ex rel. v. Board of Police Com'rs, 93 N. Y. 97.

The charges were sufficient in law to sustain the removal. They might have been drawn with more precision, and made more specific, but they are sufficient to meet the requirements of the statute. Wilcox v. People ex rel., 90 Ill. 186; People v. Higgins, 15 Ill. 110; State v. Doherty, 25 La. An. 119; Patton v. Vaughan, 39 Ark. 211; People ex rel. v. Stout, 19 How. Pr. 171; State v. McGarry, 21 Wis. 496.

MITCHELL, J. By the charter of the city of Duluth, all powers and duties connected with, and incident to, the government and discipline of the fire department of the city are vested in three commissioners, called the "Board of Fire Commissioners," who have entire control of the department, including the appointment and discharge of all employes connected with it, and making their own rules and regulations for the government of the same. These commissioners are, "on nomination of the mayor," "appointed by the common council," and hold their office for the term of three years. The charter provides that:

"Any member of said board may at any time be removed by a vote of two thirds of all the members elect of the common council of said city for sufficient cause: * * * provided, that the said common council shall previously cause a copy of the charges preferred against such member sought to be removed, and notice of the time and place of hearing the same, to be served on him at least ten days previous to the day so assigned, and opportunity be given him to make his defense personally or by counsel."

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It is here sought, by certiorari, to review the proceedings of the common council in assuming to remove the relators from the office of fire commissioners.

1. It is urged by respondents that the power of removal from office conferred on the common council is purely administrative and quasi political, and therefore that their proceedings cannot be reviewed on certiorari.

That this power may not be "judicial," in the sense that it can only be conferred upon the courts, in whom all judicial power is vested under the constitution, has nothing to do with the question; for there is nothing now better settled than that certiorari will lie to review the quasi judicial acts and proceedings of municipal officers and bodies. Neither is there anything better settled than that while the incumbent has no vested right of property. as against the state, in a public office, yet his right to it has always been recognized by the courts as a privilege entitled to the protection of the law, and that proceedings, in all cases where the amotion from office is for cause, upon notice and hearing, are adversary and judicial in their nature, and may be reviewed on certiorari. We think there is practically no conflict in the authorities on this point, the only difference among them being merely as to what they will review on such a writ. Some courts, restricting the writ to its original common-law office, hold that it brings up for review only the record, and not the evidence, and hence that they will not look into the evidence at all, but merely inspect the record, to see whether the inferior tribunal had jurisdiction, and had not exceeded it, and had proceeded according to law, or, as expressed in one case, whether the tribunal "had kept within its jurisdiction, or whether the cause assigned was a cause for removal under the statute." Other courts hold that the evidence may be brought up. not for the purpose of weighing it, to ascertain the preponderance, but merely to ascertain whether there was any evidence at all to sustain the decision of the inferior tribunal,—whether it furnished any legal and substantial basis for the decision. The latter is the doctrine of this court as to the office of the writ of certiorari. But, while this is so, we recognize the prime importance of each department of government avoiding anything like improper interference with the others in the discharge of their functions; also, that while city councils and other municipal bodies may not have the power to remove from office except for cause, yet, this power being designed to insure efficiency and fidelity in the discharge of official duty, the degree of incompetency or inefficiency which amounts to sufficient cause for removal must of necessity, within certain established limits, rest somewhat in the sound discretion of the officer or body in whom the power of removal is vested. We also recognize the fact that while in the exercise of this power their proceedings are quasi judicial, and hence reviewable by the courts, yet they are not courts, but essentially legislative and administrative bodies; and that their action should be considered in view of their nature and the purposes for which they were organized, and not tested by the strict legal rules which prevail in trials in courts of law. Hence, if such a body has kept within its jurisdiction, and the evidence furnished any legal and substantial basis for their action, it ought not to be disturbed for any mere informalities or irregularities which might have amounted to reversible error in the proceedings of a court. To apply any other rule to the proceedings of such bodies would be impracticable, and disastrous in the extreme to public interests.

2. The first contention of relators is that the common council never acquired jurisdiction, because the notice of hearing and the copy of the charges were not served on them as required by the The particular objection is that, when the service was made on them, the resolution of the common council preferring these charges against them had neither been approved by the mayor, nor passed over his veto, as required by the city charter. Sp. Laws 1887, ch. 2, subch. 3, § 1. There is no merit in this point. Under the charter the power of removal from office is vested solely in the common council, and the mayor has no power over, or control of, their proceedings in presenting or investigating charges against a city official with a view to removal from office. Their action in preferring charges against relators was not such an ordinance or resolution as comes within the purview of subch. 3, § 1, and did not require the approval of the mayor before it took effect.

3. The next question is whether the charges presented were sufficient in law to constitute a cause for removal,—whether they were sufficient in form and substance to authorize the common council "Cause," or "sufficient cause," means "legal cause," and not any cause which the council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. An attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it. Bagg's Case, 11 Coke, 93b; Rex v. Richardson, 1 Burr. 517-540; State v. Love, 39 N. J. Law, 14; State v. McGarry, 21 Wis. 496; State v. Common Council, 9 Wis. 254; People v. Thompson, 94 N. Y. 451.

While the charges need not be stated with the technical nicety or formal exactness required in pleadings in courts, yet they must be specifically stated with substantial certainty. The specifications of the alleged causes should be formulated with such reasonable detail and precision as shall inform the incumbent what dereliction of duty is urged against him. There should be a statement of charges with a specification of facts constituting a sufficient cause for removal, sufficiently distinct to apprise the officer of the grounds upon which the charges are based. Andrews v. King, 77 Me. 224; People v. Thompson, supra; Dillon, Mun. Corp. § 255.

The sufficiency and reasonableness of the cause of removal are questions for the courts. Dillon, Mun. Corp. § 252, and cases cited. This has been the settled law ever since Bagg's Case, supra, and we are not aware of any respectable authority to the contrary. Of course, cases (many of which are cited by respondents) where an officer or body was vested with an absolute power of removal at discretion are not in point.

Upon examination of the charges in this case we are clearly of opinion that they are not sufficient in law. Considering them as a whole, they show on their face that they were not formulated in a very judicial frame of mind. They read more like a heated hostile declamation than a calm and deliberate statement of charges with a view to a fair investigation. Many of them are mere glittering generalities, without any statement or specification of facts; such as, for example, "using their official positions to gratify their personal feelings and prejudices;" "that neither ability, impartiality, nor sense of justice characterize their management of one of the most important branches of the city government;" "that the gratification of their personal spites and prejudices is the paramount motive often actuating and controlling them in the supposed discharge of their duties;" "that they have no just appreciation of the responsibilities that should characterize the discharge of the duties of the important office of fire commissioner," etc. It hardly need be said that such general accusations as these are entirely lacking in any specification of facts to apprise any one of the grounds of the charges which he is called on to meet.

Some of the charges, such as that "the reasonable recommendations and requests of the common council are treated with the utmost contempt," have no relation whatever to the administration of the office of fire commissioner, and remind us of some of the charges in Bagg's Case.

The first part of the fifth charge, viz. failure to make monthly reports to the common council, as required by the charter, was virtually abandoned, no attempt having been made to substantiate it, and hence may be left out of account altogether. The only charges that even attempt to state any specific cause for removal are the fourth and the last part of the fifth. Indeed, these are the only ones which counsel for respondents seriously attempts to support. The fourth relates to the discharge of officers of the fire department without cause, or from improper motives, but is entirely lacking in specifications of either dates or names.

As the board of fire commissioners has, under the charter, absolute power to discharge any of the employes or officers of the department at their discretion, and may, in the performance of their duties, have had occasion to exercise this power frequently, so

general and indefinite a statement is not sufficient to advise them The last part of what particular acts are the basis of the charge. the fifth charge, accusing the relators generally of being "incompetent" and "inefficient," without specifying wherein or in what respect, is also entirely too vague and general. We agree with counsel that "incompetency" and "inefficiency" in the discharge of official duty may be good grounds for removal, and that it may not be necessary to specify in detail particular acts or facts. words are so general that they may mean anything or everything which might constitute good cause for removal. For example, incompetency might result from physical disability, from mental disability, or from lack of integrity, etc. So, inefficiency might consist of habitual neglect of duty, incapacity to preserve discipline, or of a variety of things. Hence, while it is not required to go into details, yet the charges ought at least to advise the officer in what respect he is claimed to be incompetent or inefficient. clusion is that none of the charges relied on are sufficient in law.

This renders it unnecessary to consider the evidence at all. We may say, however, that a perusal of it impresses us with the feeling that it furnished no reasonable basis for the action of the council in removing the relators from office. It is perfectly apparent that this whole trouble grew out of a foolish quarrel between the common council and the board of fire commissioners, over the suspension by the latter of a fireman by the name of Twaddle.

The proceedings of the common council in the matter are quashed.

Vanderburgh, J., absent, took no part.

(Opinion published 55 N. W Rep. 118.)

MICHAEL J. O'CONNOR vs. MARTIN DELANEY.

Argued April 19, 1893. Decided May 11, 1898.

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Findings Sustained-Variance Waived.

Evidence held sufficient to sustain findings of fact. Variance between pleadings and proofs held to have been waived.

Overholding Cotenant must Pay Rent.

Where one cotenant of real estate rents his share to the other for a term at a specified rent, and the latter remains in exclusive possession after the term, he will be held to do so in his character of tenant, and the same rule as to rent will apply as in case of any tenant holding over.

Appeal by defendant, Martin Delaney, from a judgment of the District Court of Ramsey County, *Chas. E. Otis*, J., entered against him May 10, 1892, for \$390.71.

On June 17, 1885, the plaintiff, Michael J. O'Connor, and the defendant each owned an undivided half of lot fifteen (15) of Partition Plat in the City of St. Paul, on which they had previous to that time done business together as equal partners under the firm name of Northwestern Stock Yards. On that day they dissolved partnership, and it was agreed between them that the defendant should have the exclusive possession and use of the property, and for the first year from that date should pay as rent for the use of plaintiff's half of the property, his half of the interest at eight per cent. a year upon a mortgage for \$2,000 on the property, \$80. other or different understanding or agreement was made by the parties as to rent, but defendant continued in possession of the premises holding over after the first year until December 17, 1890, at which time plaintiff sold his interest in the real estate. Plaintiff brought this action in March, 1891, for an accounting and settlement of the partnership affairs, and in April, 1891, brought another action for rent of his half of the real estate during the five and a half years that it was occupied by defendant; but all the matters involved were by consent litigated in the first action, and the last action dismissed. The issues were tried February 26, 1892, before the court without a jury. In stating the account between the parties, the court charged the defendant with rent of plaintiff's half

of the property for the five and a half years at the rate of \$80 a year, and with interest thereon after due, and ordered judgment for plaintiff for the balance of the account, \$359.75 and costs. Defendant made a motion for a new trial, which was denied, and judgment was entered on the findings.

- A. E. Hawes and O. H. Comfort, for appellant.
- J. F. Fitzpatrick, for respondent.

GILFILLAN, C. J. Except in regard to the claim of respondent for rent of his interest in the real estate, the joint property of the parties, there is no question but of the sufficiency of the evidence to sustain the findings of fact, and we think it sufficient.

It is also sufficient to sustain the finding of fact on the claim for rent. But it is objected that the complaint for the rent alleges that appellant was to pay the value of the use of the property, while the finding, not following the pleading, is that it was agreed appellant should pay for the first year an amount equal to the interest on a certain mortgage, to wit, \$160, and that appellant held over and continued in possession after the first year. On the trial no objection was made to the evidence as to amount agreed on for rent, nor any question raised of variance between the pleading and the proofs, and we must hold the objection to have been waived.

It is objected that, according to the evidence, the defendant agreed to pay the \$160 interest on the mortgage to the mortgagee, and he did so, and so plaintiff cannot recover it. Of course it was intended plaintiff should have the benefit of such payment, and, as the amount so paid was credited to the defendant in the partnership account, it was proper for the court, in adjusting in one judgment all matters between the parties, (including partnership matters,) to credit the amount to plaintiff; otherwise, the payment would be no benefit to him. One credit offsets the other, and it stands now as though neither party had been credited with it.

Where there is no agreement between the parties, and one cotenant is not excluded by the other from enjoyment of the common property, neither can recover from the other for the use, rents, and profits of the estate. But, by agreement, one may become tenant of the other of his part of the estate; and, when the relation of landlord and tenant is thus created, we think the tenant co-owner, if he

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remain in exclusive possession after the term for which his cotenant's share was let to him, will be held to do so in his character of tenant, and the same rules will apply as in case of any other tenant holding over. It was therefore correct to charge the defendant, during the time of his so holding over, at the rate of rent agreed on for the term.

Order and judgment affirmed.

VANDERBURGH, J., took no part in this decision. (Opinion published 54 N. W. Rep. 1108.)

EVERETT HAMMONS US. GREAT NORTHERN RAILWAY Co.

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Argued May 2, 1893. Decided May 11, 1893.

A Claim for Personal Injury is not Assignable.

A lien cannot be created upon a mere right of action for a personal tort.

Appeal by plaintiff, Everett Hammons, from an order of the District Court of Anoka County, *Henry G. Hicks*, J., made December 2, 1892, sustaining a demurrer to his complaint.

Plaintiff is an attorney at law and on January 29, 1892, was employed by Hiram Knox to bring an action against the defendant, Great Northern Railway Company, to recover \$3,000 damages for an assault committed upon him the previous day by a conductor on one of defendant's passenger trains. Knox agreed with plaintiff to pay him for his services one-half of any sum recovered, and signed a contract giving plaintiff a lien therefor upon the cause of action. Plaintiff commenced that action for Knox and notified defendant of his lien, but while it was pending, Knox settled with defendant, received \$250, and gave a release in full, but paid no part of the money to his attorney. Knox being insolvent, plaintiff brought this action to recover of the Railway Company and enforce his supposed lien. He claimed \$500, one-half the reasonable value of Knox's cause of action. The defendant demurred to the com-

plaint. The trial court sustained the demurrer, saying that Knox's cause of action was not assignable before judgment, citing Hunt v. Conrad, 47 Minn. 556; Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 443.

E. Hammons and W. Hammons, for appellant.

A lien can be obtained and enforced by an attorney in an action which dies with the person. The statute makes no distinction as to the kinds of action in which the attorney may secure a lien. 1878 G. S. ch. 67, § 1; ch. 88, § 16. The object of the statute is evidently to protect attorneys against fraudulent and collusive settlements between the client and the adverse party, as well as against the claims of third parties against the client. Crowley v. Le Duc, 21 Minn. 412.

All civil actions in which an attorney could act for a client are embraced within the protecting provisions of these statutes. When the parties agreed upon the amount of money payable to Knox, there was eo instanti a debt fixed and agreed upon, just as conclusive and binding as any judgment could make it; nor would any court presume that the money was paid before the terms of settlement were agreed upon. It does not matter one iota whether the cause of action was or was not assignable, if the statute means what it says. Wildey v. Crane, 63 Mich. 720; Smith v. Chicago, R. I. & P. Ry. Co., 56 Iowa, 720.

M. D. Grover and C. Wellington, for respondent.

It appears from the allegations of the complaint, that the cause of action held by Knox against the Great Northern Railway Co. was one personal to himself and non-assignable, and therefore an action in which the plaintiff in this case could obtain no interest whatever before judgment. Hunt v. Conrad, 47 Minn. 557; Kusterer v. City of Beaver Dam, 56 Wis. 471; Coughlin v. New York Cent. & H. R. Co., 71 N. Y. 443.

The written notice of plaintiff's lien was as follows: "You are hereby notified that I hold, and shall assert, a lien for my services in the above entitled action, by virtue of a special agreement with plaintiff." This notice does not comply with the requirements of

the statute. 1878 G. S. ch. 88, § 16; Crowley v. Le Duc, 21 Minn. 412; Forbush v. Leonard, 8 Minn. 303, (Gil. 267.)

Although there is no statute against champerty, the aid of a court ought not to be given to enforce contracts which are in their nature champertous and against public policy. Boardman v. Thompson, 25 Iowa, 487; Barker v. Birker, 14 Wis. 131; Allard v. Lamirande, 29 Wis. 502.

Smith v. Chicago, R. I. & P. Ry. Co., 56 Iowa, 720, goes to the extent of holding that an attorney can have a lien upon money paid in the settlement of a claim based on a personal tort. In this respect it is opposed to the current of authorities upon that question.

GILFILLAN, C. J. One Knox, claiming to have a cause of action against this defendant for an assault committed upon him, employed this plaintiff, as his attorney, to bring and prosecute against defendant an action therefor, and entered into a written contract with him whereby plaintiff agreed to manage the action free of charge, He agreed to pay all fees of officer, clerk, and jury, if unsuccessful. and Knox agreed to allow him to retain one-half the amount received in satisfaction of the suit, whether before or after trial, and, in terms, gave him a lien therefor upon any sum paid in settlement of the suit. It authorized plaintiff to settle the action upon receiving such sum as Knox might consent to accept, not less than \$1,000, unless plaintiff also assented. The action was commenced, and, with the summons, this plaintiff caused to be served on the defendant a notice that he held, and should assert, a lien for his services in the action by virtue of a special agreement with the plaintiff. Afterwards the defendant settled with Knox, paid him an amount agreed on, and he released the cause of action. action is to recover the value of this plaintiff's alleged lien on that cause of action.

Several reasons are suggested why plaintiff cannot recover, only one of which we need refer to. The plaintiff had no lien—could not have any—on the cause of action. A cause of action for a personal tort is strictly personal. It is not in the nature of property, in the sense that any one but the injured party can have any right in it. It is not assignable, and does not pass to the party's

representatives, but dies when he dies. Hunt v. Conrad, 47 Minn. 557, (50 N. W. Rep. 614.) It acquires the usual attributes of property only when it passes into judgment, and ceases to be a mere right of action. It follows that no lien upon it while it remains a mere personal right of action can be created.

Order affirmed.

Vanderburgh, J., absent.

(Opinion published 54 N. W. Rep. 1108.)

JOHN SANDBERG vs. S. T. PALM et al.

Submitted on brief by appellant, argued by respondent, April 20, 1893. Decided May 11, 1893.

Time of Bringing Suit to Foreclose Mechanic's Lien.

In an action to foreclose a mechanic's lien, the fact that it was not commenced within one year after the date of the plaintiff's last item, by reason of which he cannot recover, will not prevent a recovery by a lienclaiming defendant, whose answer is filed within a year after the date of his last item.

Knowledge of Broker not Notice to Owner.

Knowledge in an agent, authorized only to sell real estate, that a building is being constructed on it, is not knowledge in the owner, for the purposes of Laws 1889, ch. 200, § 5.

Finding not Sustained by the Evidence.

Evidence held insufficient to sustain a finding of fact.

Appeal by David A. Corey, one of the defendants in this action, from an order of the District Court of Ramsey County, William Louis Kelly, J., made March 11, 1893, denying his motion for a new trial.

The defendant Corey, of Fitchburg, Massachusetts, owned lots fourteen (14) and fifteen (15) of Chute Brothers' Division No. 6 Addition to St. Paul. Early in 1890, he wrote his friend Joseph W. Fairbank of St. Paul to put the property into the hands of brokers for sale. Fairbank employed John M. Dahlby, a real-estate broker,

to sell the property. Dahlby made an oral agreement with Nels Burkey, and on April 1, 1890, Fairbank at the instance of the broker, signed a contract for Corey with Burkey to sell and convey the lots to Burkey, or his assigns, for \$2,300, to be paid on or before August 1, 1890, with interest at the rate of eight per cent. a year. Burkey took possession, and began at once to build four dwelling houses thereon, but before completing them, he became insolvent and abandoned the work.

The plaintiff, John Sandberg, performed labor for Burkey upon the houses prior and up to June 21, 1890. He made and filed a lien statement, and commenced this action to foreclose it. complaint was filed June 20, 1891, but the summons was not delivered to the Sheriff for service until August 14, 1891. Palm, Ole Hammer and other parties who had performed labor or furnished materials, seeing the complaint on file, appeared and filed answers setting up their respective claims for liens and asking foreclosure. Corey filed his answer on October 13, 1891. Hammer built the foundations for the houses for the contract price of He commenced the work May 2, and finished it October 21, 1890, and duly filed his statement for a lien. He filed his answer in this action on July 6, 1891, setting forth his lien, and prayed judgment against Burkey for said amount and interest. prayed that the premises be sold and his claim paid from the proceeds, and that Corey's title be adjudged subject to his lien because, as he alleged, it was orally understood between Corey's agents and Burkey that Burkey should build the houses, and then mortgage the property and obtain money to pay Corey for the lots, and that Corey must be presumed to have had notice of the improvement, yet gave no notice (as required by Laws 1889, ch. 200, § 5) that his interest in the property would not be subject to lien. May, 1892, the court, on motion founded on a stipulation as to the dates, determined that all the other lien claimants were too late with their answers to preserve their liens. The issues were tried October 31, 1892, and findings of fact were made and judgment ordered denying plaintiff any relief, but giving defendant Hammer the relief he prayed. Corey moved for a new trial, and, being denied, he appeals, and the contention in this court is between these two defendants.

William G. White, for appellant.

There never was any action properly commenced by the plaintiff. The fact that his right of action was barred June 21, 1891, rendered the delivery of a summons to the Sheriff on August 14, 1891, and the publication thereof after that time, a mere nullity, and could not operate as the beginning of an action. Neither did it operate to begin an action in favor of the defendant Hammer, because up to August 14th there was no action pending against the defendant Corey, and the filing by Hammer of his answer prior to that time was a simple voluntary act, which conferred no rights upon him, and fastened no obligation upon the defendant Corey. Steinmetz v. St. Paul Trust Co., 50 Minn. 445; Smith v. Hurd, 50 Minn. 503.

The trial court found that the defendant Corey knew of, and consented to, the erection of the buildings upon the premises, and that he did not object or give notice in any manner. This finding is unsupported by the evidence.

Daniel W. Doty, for respondent.

Hammer's answer was filed July 6, 1891. Corey filed his an swer, October 13, 1891. So that when Hammer's year expired on October 21, 1891, both Corey and Hammer had answers on file in this action, and according to Smith v. Hurd, 50 Minn. 503, cited by appellant, the action was commenced and pending from the time of his appearance without service. It matters not to Hammer, that by the negligence of plaintiff and other defendants, no summons was served or appearance made, within the life of their liens. It was sufficient for Hammer that on October 13, 1891, eight days before his year expired, an action was not only pending, but the cause at issue, as to Corey and Hammer.

The findings of the court that Corey knew of the erection of the buildings, and that Fairbanks was his agent, are supported by the evidence.

Respondent concedes that any verbal authority from Corey to Fairbanks would be insufficient to empower Fairbanks to make a valid, enforceable contract for a conveyance. Indeed any oral contract by Corey himself to convey land to Burkey would be void,

but it would be admissible to establish, that work was done with his knowledge and assent. Oral authority to Fairbanks to sell, and to induce and solicit purchasers to build, although insufficient to empower Fairbanks to make a valid contract of sale, was sufficient to establish the fact that the buildings were erected with the knowledge and assent of Corey, and at his instance, with his license. Little v. Willford, 31 Minn. 173; Althen v. Tarbox, 48 Minn. 18.

GILFILLAN, C. J. Action to foreclose a mechanic's lien. The contest on this appeal is between Hammer, a lien-claiming defendant, and Corey, the owner defendant, who appeals from an order denying his motion for a new trial after a decision against him.

The appellant's first point is that the plaintiff's action was not commenced within a year after the date of the last item of his lien, and consequently no lien claimant could appear as defendant in the action, and assert his lien, although, when appearing, his lien was The date of plaintiff's last item was June 21, 1890. complaint was filed, the notice of lis pendens filed for record, and the summons made out, June 20, 1891, though the latter was not delivered to the sheriff for service till August 14, 1891, and the summons was served on Corey, by publication, within sixty days He filed an answer October 13, 1891. thereafter. The date of Hammer's last item was October 21, 1890, and he filed his answer July 6, 1891; so that when the action was commenced more than a year had elapsed since the date of plaintiff's last item, and less than a year since the date of Hammer's last item. That the plaintiff did not commence his action within the year did not go to the jurisdiction of the court. As soon as the summons was served there was an action pending to enforce his lien, in which any lien claimant might present his claim of lien. That plaintiff's action was not commenced within his year was matter of defense only; and certainly the claim of any defendant to a lien cannot be affected by any other party to the action succeeding or failing in his claim. Hammer having filed his answer within a year, and the court having acquired jurisdiction to determine liens, he was entitled to have his claim allowed, if established, although there was a defense to plaintiff's claim.

The houses upon which respondent's labor and material were furnished were constructed by one Burkey on Corey's real estate, respondent doing the work and furnishing the material for Burkey. The lien is claimed under Laws 1889, ch. 200, § 5, on the ground that Corey had knowledge that the work was being done and material furnished, and failed to give the notice required by that sec-At the trial the chief contention of fact was as to whether Corey had such knowledge or notice, so as to make it his duty to give the notice so required. He was a nonresident, and there is no suggestion in the evidence that he had personal knowledge or personal notice of it till after all the work was done, and the materials had been furnished. One Fairbanks, assuming to act as his agent, executed in his name, April 1, 1890, a written contract to convey the real estate to Burkey; and there is evidence that between Fairbanks and Burkey it was understood at the time that the latter would build on it. It is not shown that Corey knew of this understanding. It may be assumed that the notice to Fairbanks was sufficient, provided he was the agent of Corey, with such authority that his knowledge that the work was being done would be, under the section referred to, the knowledge of the latter. evidence indicates that he was authorized to place the real estate in the hands of agents to sell it. It might be possible, on the evidence, to sustain a finding that he had authority to sell it himself. That is the utmost that the evidence suggests as to his authority in respect to the real estate prior to January, 1891. At that time, being informed that parties had "squatted" on the real estate, Corey wrote to Fairbanks that, as he knew no one in St. Paul, he should rely on him to care for it, or employ some competent man Such a request, with such a purpose in view, might give the agent sufficient authority, so that his knowledge would be the knowledge of his principal, under section 5. But that was after the transactions herein involved. As that section is construed by this court, knowledge by the owner, and failure to serve notice, is evidence of his consent that his land be charged with the claims of persons doing work or furnishing material in constructing a building upon it. Wheaton v. Berg, 50 Minn. 525, (52 N. W. Rep. 926.) To make knowledge of an agent equivalent to knowledge of the owner, his authority must be such that he could bind his principal

by consenting to so charge the land. An agent merely to sell has no such authority. In a memorandum filed, upon denying the motion for a new trial, the court below appears to think that evidence of the requisite authority in Fairbanks is found in a letter from Corey to Mr. Doty under date of March 27, 1891. had written to him, "April 1, 1890, you sold by your attorney, Joseph W. Fairbanks, to Nels Burkey," this real estate, stating that Burkey partly erected four buildings on it, and paid the laborers nothing, and asking how much, in cash, he will take for the lots, subject to In answer to this, Corey wrote: "Dr. J. W. Fairbanks still has charge of all my real estate in St. Paul, and I will forward your note, and ask him to reply to it." The court below construed this as an admission of Fairbanks' authority back to April 1, 1890, and so far the court was correct. But what authority is thus admitted? Clearly, only the authority indicated in Doty's letter, to wit, authority to sell the real estate.

The evidence was entirely insufficient to show Fairbanks' authority such that his knowledge could be held the knowledge of Corey. Order reversed.

Vanderburgh, J., absent.

(Opinion published 54 N. W. Rep. 1109.)

Application for reargument denied May 23, 1893.

WILBUR S. REYNOLDS vs. SYDNEY H. CURTISS et al.

Submitted on briefs April 24, 1898. Decided May 11, 1898.

Findings Sustained by the Evidence.

Evidence held sufficient to sustain a finding of fact,

Appeal by plaintiff, Wilbur S. Reynolds, from an order of the District Court of Otter Tail County, L. L. Baxter, J., made September 29, 1891, denying his motion for a new trial.

Plaintiff owned lots six (6) and seven (7) in block five (5) in the Village of Henning, and on October 23, 1886, mortgaged them for \$400 to the defendants, Sydney H. Curtiss and Adelbert G. Lawv. 53m.—17

This mortgage was foreclosed September 15, 1888, under a power therein, and the lots were sold by the sheriff to the mortgagees for \$465.82. Plaintiff claims that on September 10, 1889, defendants orally agreed with him that he should have an extension of time in which to redeem from the sale, and that they would take the redemption money in installments from time to time convenient for plaintiff; that relying on such agreement, he allowed the year to expire in which he could redeem, remained in the possession, and on October 15, 1889, paid defendants \$100. denied the agreement, and claimed the \$100 was paid as rent. trial court found for defendants, and ordered judgment that plaintiff take nothing and pay the costs. He moved for a new trial, and, being denied, appeals. The discussion in this court was upon the evidence, whether or not it was sufficient to support the finding that there was no agreement extending the time for redemption.

Chas. L. Lewis, for appellant.

W. P. Bailey and Taylor, Calhoun & Rhodes, for respondents.

GILFILLAN, C. J. The court below having found against the allegation that there was an agreement extending the time for redemption, there is no basis for any of the questions of law raised; and the evidence was such as to justify the court's finding of fact.

Order affirmed.

Wanderburge, J., took no part in this decision. (Opinion published 55 N. W. Rep. 548.)

DANIEL BROWN vs. WINONA & SOUTHWESTERN RAILWAY Co.

Argued April 19, 1898. Decided May 11, 1898.

Surface Water-Rights and Liabilities of Landowner.

The rule stated in O'Brien v. City of St. Paul, 25 Minn. 331, that "an owner may improve his land for the purpose for which such land is ordinarily used, and may do what is necessary for that purpose. He may build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go,"—followed, and held that it makes no difference under the rule that the water shed over other land passed to it in a stream, instead of in a diffused manner.

Appeal by defendant, Winona & Southwestern Railway Company, from an order of the District Court of Winona County, Chas. M. Start, J., made August 4, 1892, denying its motion for a new trial.

The plaintiff, Daniel Brown, owned lot seven (7) in block two (2) in the Village of Utica, and with his family occupied the dwelling house thereon. It fronted north onto a street sixty-six feet wide running east and west. Across the street to the north, and parallel with it, is the roadbed and track of the railroad, elevated several feet upon an embankment built for the purpose. Through this embankment is a sixteen-inch tile culvert. In times of heavy rain or melting snow the surface water comes from the north down to the embankment, and flows along the north side of it from the east, and from the west, to this culvert, and then through it and across the street to plaintiff's lot. The surface of the country in that immediate vicinity is cultivated and nearly level, inclining slightly to the south. Prior to the construction of the embankment and culvert the surface water had been ordinarily diffused over the ground, doing very little, if any, injury. Plaintiff claimed, it was now gathered into a single place, and discharged through the culvert so as to injure and depreciate the market value of his house and lot. He brought this action to recover such damages. At the trial on May 2, 1892, he had a verdict for \$200. Defendant asked a new trial, but was denied, and it appeals.

Thomas Simpson and Henry M. Lamberton, for appellant.

It is not alleged or claimed that there was anything wrongful in the mode of constructing the embankment, culvert or ditches, that the ditches were either too large or too small, or were unskillfully or badly constructed, or that the embankment was too high or too low, or too large or too small, or that it was unskillfully or badly constructed; or that the culvert was unskillfully or badly constructed, or that it was improperly located, or that there should have been a greater number of culverts, or that it was insufficient in capacity; or that either the embankment, culvert or ditches, as constructed, were unnecessary to the proper construction of the railroad. The plaintiff calls in question only the right of the defendant to have the embankment, culvert and ditches there, if their effect is to accumulate surface water and cause it to flow on plaintiff's lot, where it would not otherwise flow. law in this State as to surface water is in accordance with the common law, and is fully defined in the following cases: Jordan v. St. Paul, M. & M. Ry. Co., 42 Minn. 172; Lee v. City of Minneapolis, 22 Minn. 13; O'Brien v. City of St. Paul, 25 Minn. 331; Henderson v. City of Minneapolis, 32 Minn. 319; Rowe v. St. Paul, M. & M. Ry. Co., 41 Minn. 384.

There is also a recent decision of the Wisconsin court which is directly in point. Johnson v. Chicago, St. P. M. & O. Ry. Co., 80 Wis. 641.

If the town, prior to the construction of the railroad, had graded up the streets so that the surface water would not flow along and upon the same, and thus the flow across plaintiff's lot had been increased to his injury, the town would not have been liable to plaintiff for the injury which he thereby sustained, nor would plaintiff have a right of action against the town for so doing. Alden v. City of Minneapolis, 24 Minn. 254.

Keyes & Brown, for respondent.

The law applicable to the facts, as found in this case by the jury, has been several times considered and declared by this court, and was stated by the learned Judge in his charge to the jury. It has been developed in this State under a gradual process of inclusion

and exclusion through the following cases, besides those cited by defendant: Hogenson v. St. Paul, M. & M. Ry. Co., 31 Minn. 224; Township of Blakely v. Devine, 36 Minn. 53; Pye v. City of Mankato, 36 Minn. 373; Beach v. Gaylord, 43 Minn. 476; Follmann v. City of Mankato, 45 Minn. 457.

In this case if the defendant has, by means of its ditches and culvert, cast surface water upon the premises of the plaintiff, in increased and injurious quantities, it is liable for the damage inflicted, and it is immaterial that the ditches and culvert were necessary to the operation of the road, and that they were carefully constructed. Staton v. Norfolk & C. R. Co., 111 N. C. 278; Jenkins v. Wilmington & Weldon R. Co., 110 N. C. 438.

GILFILLAN, C. J. The defendant constructed its road, running from east to west, across block 2, in the village of Utica, in this For the purpose of laying its track, it raised an embankment across the block, taking the earth from along each side, thus making on each side what is called a "borrow pit." The two pits were connected by a culvert through the embankment. north side the surface of the ground slopes for a considerable distance towards this part of the embankment from the north and northeast and northwest, so that the surface waters from rains and melting snows flow towards that part of the embankment, and before it was there, flowed over the lands to the south and east. effect of the embankment was to stop the flow of surface water in a diffused manner over the surface of the ground to the south; to gather it into the north borrow pit, from which it flowed through the culvert to that on the south side, and from that, at its lower or easterly end, it flowed in a stream upon plaintiff's lot in the same It is to be assumed, for the purpose of the point involved, that the presence of the embankment, culvert, and borrow pits was the cause of the water flowing in a stream on plaintiff's land, and that no such quantity of surface water would have reached his land but for their existence.

No question is made of the defendant's right to make the embankment, culvert, and borrow pits, nor is it claimed that they were not necessary to the construction of the railroad in the usual way of constructing railroads over similar ground, nor is any negligence in the manner of doing the work seriously claimed.

The case was, in effect, left to the jury, upon the proposition (upon which respondent's counsel squarely present their case here) that if the embankment, culvert, and borrow pits, though carefully made, and necessary to the construction and operation of the road, caused the surface waters to accumulate and flow in a stream, as they would not have done had not the natural surface of the ground been disturbed, upon plaintiff's land, doing damage, the defendant is liable.

The question of the rights of landowners in respect to surface waters has, in one form or another, been many times before this court. From the memorandum of the learned judge who tried the cause, it is apparent that he misapprehended to some extent the decisions of this court on the subject. We are not surprised that he did so, for in some of the opinions are expressions which, disconnected from the facts of the cases in which they were written, would point to the conclusion at which he arrived. This makes it proper to analyze most of those decisions.

The civil-law doctrine of servitudes in respect to surface waters has never been admitted in this state. Nor has the common-law rule been admitted, in the rigorous form in which it has been expressed by some text writers and decisions. Surface water has been styled a common enemy, which every landowner may get rid of as best he can, and every owner must guard against as best he may. We have held that each owner's absolute liberty in respect to such waters must be modified by the maxim that each must so enjoy his own as not unnecessarily to injure another's.

In O'Brien v. City of St. Paul, 25 Minn. 331, an attempt was made to state the rule on the subject thus: "An owner may improve his land for the purpose for which such land is ordinarily used, and may do what is necessary for that purpose. He may build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go." Any more restricted rule

than this would be likely to seriously interfere with the proper improvement and enjoyment of lands. Every landowner must hold his own land subject, so far as surface waters are concerned, to whatever effect on his land the proper improvement and enjoyment of their land by his neighbors may have. In that case the court declined to decide whether in any case an owner can lawfully improve his own land in such a way as to cause the surface water to flow off in streams on the land of another, but it did decide that he may not do so unless it be necessary to the proper improvement and enjoyment of his own land, and, because the defendant had done so without such necessity, it held the plaintiff entitled to recover. Jordan v. St. Paul, M. & M. Ry. Co., 42 Minn. 172, (43 N. W. Rep. 849,) is the only case in which the facts presented, so that it had to be decided, the question which the court declined to decide in the O'Brien Case. It was a case where, as an incident or necessary consequence of properly constructing the defendant's railroad, the surface waters were collected in a ditch. and flowed in streams, in increased and injurious quantities, on plaintiff's land. The court held it came within the rule stated in the O'Brien Case, and that plaintiff could not recover. Hogenson v. St. Paul, M. & M. Ry. Co., 31 Minn. 224, (17 N. W. Rep. 374,) the only attempt by defendant to improve its own land was by collecting the surface waters naturally resting on it. and, by means of ditches, conducting them to, and depositing them. on, the land of the plaintiff. It was held plaintiff could recover. The court referred to the rule in the O'Brien Case, but held that one may not improve his own land by merely transferring to the land of another a burden which nature has imposed on his own. In reference to that decision the court, in the Jordan Case, said: "It is only where such shifting of the burden follows as an incident to using or improving his land, as such land is ordinarily used or improved, that it can be justified." Township of Blakely, v. Devine, 36 Minn. 53, (29 N. W. Rep. 342,) was a case where the town authorities, for the purpose of relieving a highway from surface waters collecting on it, made ditches to conduct such waters to and discharge them on the land of the defendant, and he had constructed an embankment to prevent the waters flowing

on his land. The action was to restrain him from so preventing them. No question of liability of the town was in the case. court stated the question as follows: "The material question would seem to be the right of the defendant to protect his land from the overflow of the surface water collected in the highway, chiefly as the result of heavy rains." The town authorities were really endeavoring, in the action, to impose a servitude on the defendant's land, and maintain it as dumping ground for waters collecting on the highway, and the court held they could not do this. In Pye v. City of Mankato, 36 Minn. 373, (31 N. W. Rep. 863,) the defendant, in improving a street, had constructed a gutter to collect and convey to the river surface water which had previously. following a natural depression in the ground, flowed across the street, which gutter was "negligently and wrongfully constructed, wholly insufficient in capacity to contain and carry off the water, and as a consequence it overflowed, and was cast in large and injurious quantities upon, the land of plaintiff." The negligent and wrongful constructing of the gutter could not be deemed doing what was necessary to the proper improvement of the street. The opinion states five propositions as to the liability of a municipal corporation in respect to surface waters in grading its streets. The fifth is as follows: "But a city will be liable if it collects and gathers surface water by artificial means, such as sewers and drains, and casts it upon the premises of another in increased and injurious quantities. Such an act amounts to a positive trespass." As applied to and explained by the facts of the case then in hand, the proposition was correct, though as a general rule applicable to a landowner in improving his land for the purposes for which such land is ordinarily used, it may be criticised as not sufficiently guarded and qualified. The proper qualification of it is given at the end of the opinion, in stating the reason for the defendant's liability, thus: "Having intercepted the natural flow of this water, undertaken to gather up and conduct it in another direction by an artificial channel, it was incumbent on the city to use reasonable care to do this in such a way as not to cause a positive trespass upon the lands of others. To fail to do this is negligence. Such was the fact in this case, and this brings it within the cases last cited." As

thus qualified the proposition is within the rule in the O'Brien Case, for that rule does not admit of a landowner causing damage to the land of others by the negligent manner in which he improves his own land. Rowe v. St. Paul, M. & M. Ry. Co., 41 Minn. 384, (43 N. W. Rep. 76,) was a case of obstructing and setting surface waters back upon plaintiff's land. The only point decided was that a landowner, in improving his own land, is not obliged to provide for the passage of such waters as previously flowed from other land upon and over his own. Though there were no facts in the case calling for it, the opinion says, speaking of an owner's rights with respect to surface water, "he is not permitted to collect in a stream or body, and turn it upon the lands of others, to their injury;" citing the Hogenson and Township of Blakely Cases. Follmann v. City of Mankato, 45 Minn. 457, (48 N. W. Rep. 192,) was, like that of Pye v. City of Mankato, a case of negligence. The opinion in one place says: "If the result of improvements actually made is to collect such water in a stream, and turn it thereon, [on the land of another,] to the damage of the owner, an action will lie." This expresses more nearly than language found in any other opinion of this court the proposition decided by the court below in this case. But it was not necessary to the decision of the case, for later in the opinion the court, after referring to certain acts of negligence on the part of defendant, says: "And in respect to the particular jury complained of the evidence is sufficient to show that it was due to an invasion of surface water, traceable to the acts and negligence above specified." The opinion in Beach v. Gaylord, 43 Minn. 476, (45 N. W. Rep. 1095,) contains a similar unguarded statement, though that was a case where the injury did not follow as a necessary incident to the owner's proper improvement of his land. The action was for damage to plaintiff's premises by defendant gathering the rain water falling upon the roof of his house into a gutter, in which it flowed to a pipe which discharged it—of course, in a stream—upon the ground so near plaintiff's line that it flowed in an increased quantity at that point upon her lot, doing damage. It was found as a fact by the court below that there was no apparent necessity for so doing, in the

proper improvement and enjoyment of defendant's own land, so that the case was really like that upon which the court held the defendant liable in the O'Brien Case.

From this review of the cases, it is apparent that the Jordan Case is the only one before this court in which was distinctly presented for decision the point involved in the proposition upon which the trial court left this case to the jury. For the sake of precision, we will restate the question: When an owner improveshis land for the purpose for which such land is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, is he liable because, as an incident of so improving, surface waters accumulate and flow in a stream upon the lands of others? A doubt upon this was suggested in the O'Brien Case. But on more mature consideration we are of opinion that the owner so improving is not liable. The rule stated in that case has frequently been quoted in other cases in this court, and its correctness has never been questioned; and, but for the doubt suggested in that case, we do not think it would have been questioned that a case like this comes within it. One's land may be incidentally, even seriously, injured in value and usefulness by the proper improvement of adjacent land, withdrawing from it surface waters, the presence of which may improve its fertility and value, or shedding upon it surface waters which would not otherwise go there, and drowning it, or otherwise impairing its value, or causing such waters to remain upon it, although their presence may render it comparatively valueless, and no action will lie. When the injury is incidental to the proper improvement of adjacent land, it is impossible to see that the manner in which such improvement operates to cause the injury-whether by drawing off the waters, or setting them back so that they cannot flow off, or causing them to run either in a diffused manner or in streams—can make any difference with the liability. If a man's land be injured to the extent of \$500 by surface water coming upon it, it would seem illogical and unreasonable that he may recover if it comes in streams, but cannot recover if it come in a diffused manner. The test of liability must be, is the injury incidental to another man doing on his own land what he has a right to do, i. e. improve it for the purpose for which such land is ordinarily used, doing what is necessary for that purpose? It must, however, be understood that one cannot improve his own land by merely transferring waters which would naturally rest upon it to the land of another. Order reversed.

VANDERBURGH, J., took no part in this decision.
(Opinion published 55 N. W. Rep. 138.)

STEPHEN C. RUGLAND vs. LAURITZ TOLLEFSEN et al.

Argued by appellant, submitted on brief by respondents, April 27, 1893. Decided May 11, 1893.

A Misleading Charge to the Jury.

A charge held erroneous because it might mislead the jury to suppose they could, from the evidence, find a certain fact, there being no evidence of such fact.

Appeal by plaintiff, Anna Brooks, (since deceased,) from an order of the District Court of Otter Tail County, D. B. Searle, J., made-June 20, 1892, denying her motion for a new trial.

After the appeal to this court was perfected and the return filed, the plaintiff departed this life intestate, and Stephen C. Rugland was appointed by the Probate Court of Otter Tail County, administrator of her estate. On application he was substituted as plaintiff in her stead, and the appeal placed on the calendar for argument.

On November 1, 1889, the defendants Lauritz Tollefsen, Jens Tollefsen and Christian Tollefsen, made their promissory note to Sarah Thompson for \$290.70 due one year thereafter, with ten per cent. interest. She transferred the note before its maturity to Anna Brooks. It was not paid, and she brought this action to recover the contents. The defendants answered that at the date of the note, the defendant Lauritz Tollefsen was indebted to Stephen C. Rugland \$260.70, and made the note in suit for the debt and \$30 usury, and the other defendants signed it as his sureties; that

Sarah Thompson was Rugland's mother-in-law and a member of his family, and he was her agent; that he was the real owner of the note and she had no interest in it; that Anna Brooks is his sister-in-law; that the transfer of the note to her was a sham, and only colorable, and that she paid nothing for it, never had possession of it, and is not in fact the owner of it. On the trial there was evidence that Anna Brooks paid full value for the note. was no evidence other than this relationship, that Rugland was her agent or acted for her in the purchase. The trial Judge charged the jury however, that if they believed Rugland was the agent of Anna Brooks in the purchase, his knowledge of the usurious inception of the note might be imputed to her, and she could not recover. The plaintiff excepted. The jury returned a verdict for defendants. The plaintiff moved for a new trial, but was denied, and she appealed.

Charles C. Houpt, for appellant.

From the testimony of Rugland's wife, it appears that the negotiation for the purchase of the note was conducted by Anna Brooks in person. There is an entire absence of any testimony in the record to contradict the claim of Anna Brooks that she was an innocent purchaser of the note in suit, for value, before maturity. It was therefore error to charge the jury regarding Rugland's agency. As an abstract statement of law, this portion of the court's charge may be correct; but as applied to the facts in this case, it was prejudicial and without foundation of fact.

Jenkins & Treat, for respondents.

After proof of usury in the inception of the note, the burden of proving herself an innocent purchaser of the note before maturity for value, was cast upon the plaintiff. The testimony of Mrs. Rugland (plaintiff's sister) does not relate to the actual transfer of the note from Sarah Thompson to Anna Brooks, but to a conversation between them about a sale and purchase of the note. Mrs. Brooks has not satisfied the rule, that under such circumstances as are in this case, she must prove that she purchased the note in good faith, and for value. Cummings v. Thompson, 18 Minn. 246, (Gil. 228.)

The evidence in the record fairly applicable to the relation be

tween Rugland and Anna Brooks is sufficient to justify the charge of the court upon the subject of agency between them, and the terms of the charge on that point are like those approved in Lebanon Savings Bank v. Hellenbeck, 29 Minn. 322.

GILFILLAN, C. J. Upon the question whether, when she purchased the note in suit, the plaintiff had notice of its usurious character, the evidence, though scant, was probably enough to justify leaving it to the jury. But there was no evidence whatever that Rugland acted as her agent in making the purchase, and therefore the charge that if the jury believed that he was her agent to make, and as such made, the purchase, his knowledge as to the character of the note would be notice of it to her, and she could not recover, was erroneous, because it might mislead the jury into supposing they could, from the evidence, find such agency.

Order reversed.

Vanderburgh, J., absent.

(Opinion published 55 N. W. Rep. 198.)

NORTHWESTERN GUARANTY LOAN Co. vs. CHARLES E. CHANNELL.

Argued May 5, 1893. Decided May 11, 1898.

Requisites of Agreement to Submit to Arbitration.

An agreement to submit certain matters to arbitrators, under the statute, is of no effect if the names of the arbitrators are not in it when it is acknowledged. They cannot be inserted afterwards.

When Last Day is Sunday and is not Excluded.

The statutory rule for computing time does not apply to ascertain the day, or the last day, on which a thing may be done, where such day is expressed by its date.

Appeal by Northwestern Guaranty Loan Company of Minneapolis, from an order of the District Court of Hennepin County, Seagrave Smith, J., made September 19, 1892, vacating and setting aside an award of arbitrators.

On June 5, 1892, the above-named corporation entered into an agreement with Charles E. Channell providing that Daniel W. Lane and Charles A. J. Marsh should select for them three disinterested persons to act as arbitrators of the difference existing between them, and should insert the names of such arbitrators in the blank space left in the agreement to arbitrate, that day executed by Channell and the Corporation. Lane and Marsh selected three arbitrators and inserted their names. The arbitrators then heard the parties, and made an award dated Saturday, July 9, but it was not delivered or filed in court until Monday, July 11, 1892. agreement for submission provided that the award should be made and reported to the District Court on or before July 10, 1892. Channell was dissatisfied with the award, and moved the court, on notice and affidavits stating these facts, to vacate and set it aside. The motion was granted, and the Corporation appeals.

Charles J. Bartleson, for appellant.

This submission, as it appears upon the record, is in form a perfect compliance with the requirements of the statute, but it was sought in the court below to impeach it by the affidavit of Channell. It has been held that a written submission cannot be varied by parol testimony. Morse, Arb. & Award, 63; Efner v. Shaw, 2 Wend. 567; McNear v. Bailey, 18 Me. 251; De Long v. Stanton, 9 John. 38.

It is also now the accepted law of this State that a party who executes an instrument in blank with authority to a designated agent to fill it up, is estopped to deny its validity. *Pence* v. *Arbuckle*, 22 Minn. 417; *Dobbin* v. *Cordiner*, 41 Minn. 165.

But we contend that taking these two contracts together, they were a complete submission in themselves within the meaning of this statute.

The second ground upon which the court below held the award to be bad, was that it was not filed in time. On this subject we have a statutory rule. 1878 G. S. ch. 66, § 82, which provides that if the last day is Sunday, it shall be excluded. Frankoviz v. Smith, 34 Minn. 403; Spencer v. Haug, 45 Minn. 231; Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223.

Hart & Brewer, for respondent.

Jurisdiction could not be conferred upon the arbitrators in any other way than that pointed out by the statute. It is a special jurisdiction which can be created only in the manner prescribed by the statute. Barney v. Flower, 27 Minn. 403; Holdridge v. Stowell, 39 Minn. 360.

1878 G. S. ch. 89, § 3, requires the time for the making of the award to be fixed in the arbitration agreement, and section 8 provides that no award made after the time fixed by agreement of the parties shall have any legal effect or operation. The award is not "made" until filed. Bent v. Erie Tel. & T. Co., 144 Mass. 165; Lowell v. Wheaton, 11 Minn. 92, (Gil. 57.)

In this case no resort to computation of time is required or possible. The arbitration agreement fixes a date and excludes all computation. No calculation or computation is requisite to determine the expiration of the time.

GILFILLAN, C. J. This is an appeal from an order of the district court rejecting and setting aside an award filed, upon an attempt at a statutory arbitration between these parties. They attempted to submit certain matters to arbitration, but the agreement to do so, at the time it was signed and acknowledged by the parties, did not contain the names of any arbitrators. They appear to have been unable to agree on arbitrators, and so entered into a written agreement authorizing two other persons to select them. The two selected three persons as arbitrators, and their names were inserted in the agreement of submission, by the two persons so authorized, or one of them, after it was signed and acknowledged.

The agreement of submission required the arbitrators to make and report their award on or before the 10th day of July, 1892. That day fell on Sunday, and the award was filed on the 11th. The statute provides (1878 G. S. ch. 89, § 8) that "no award made after the time so agreed upon shall have any legal effect or operation unless made upon a recommitment of the award by the court to which it is reported."

Other objections are made to the award, but either of these is conclusive, and it is unnecessary to consider the others.

It was held in Barney v. Flower, 27 Minn. 403, (7 N. W. Rep. S23,)

that the jurisdiction created by arbitration "is a special jurisdiction, which can be created only in the manner prescribed by the statute. Every material requirement of the statute must be complied with. Among them is the acknowledgment prescribed;" and it was also held that the appearance of the parties before the arbitrators, without objection, did not cure the defect. The acknowledgment of an agreement, incomplete by reason of material stipulations being omitted, will not do. If one material part may be left blank, any other or all may. If the names of the arbitrators may be left to be afterwards inserted, no reason can be given why the parties may not do the same with the subject-matter of the arbitration, or with any other thing required by the statute to be in the agreement.

Because not complete when acknowledged, this agreement was of no effect as a statutory submission to arbitration.

It is conceded that, if the award was filed too late, it was of no effect; but it is claimed that the statutory rule for computing time, of excluding the first and including the last day, and excluding the last when it is Sunday, applies, and that, in determining when was the last day for filing the award, the tenth, because it was Sunday, should be excluded, and the eleventh held to be the last day. But the statute was intended to apply only when it is necessary to have a rule for ascertaining the first day or the last day on which a thing may be done. Such a rule is necessary only when a thing is to be done within a specified period; as within a week, month, or year, or designated number of days, weeks, months, or years. When the first or last day is expressed, no rule is needed to ascertain what that day is.

The statutory rule does not apply here, and the award was filed too late.

Order affirmed.

VANDERBURGH, J., took no part in this decision.

(Opinion published 55 N. W. Rep. 121.)

WILLIAM MIES vs. WALTER M. THOMPSON.

Submitted on briefs April 28, 1898. Decided May 11, 1898.

Practice-Service of Notices-Pleadings, etc.

Service upon an attorney at his office, he being absent, can be made by leaving the paper in a conspicuous place in the office only when there is in the office no clerk of his, or person having charge thereof.

Appeal by defendant, Walter M. Thompson, from an order of the Municipal Court of the City of Duluth, *Eric L. Winje*, Special Judge, made July 27, 1892, denying his application to vacate the judgment and allow him to answer.

The plaintiff, William Mies, a tailor, made an overcoat for defendant, and brought this action to recover the agreed price, \$30. Defendant did not appear or answer, and on July 11, 1892, judgment was entered against him for that amount and costs. On July 22d, H. S. Lord made affidavit that he served an answer for defendant July 8, 1892, between four and six o'clock in the afternoon, by leaving the same in the office of plaintiff's attorney in a conspicuous place, the attorney being absent therefrom. On this affidavit and the judgment roll, defendant asked the court to vacate the judgment and allow him to answer. The motion was denied, and he appeals.

Lord & Norton, for appellant.

Geo. E. Arbury, for respondent.

GILFILLAN, C. J. After the time for answering in the court below expired, upon an affidavit by the plaintiff's attorney that no answer or demurrer had been received, nor appearance in any manner made by defendant, judgment for plaintiff was duly entered by default. Twelve days after, defendant made an application to have the judgment vacated, and for leave to answer, on an affidavit by his attorney that, before the time to answer expired, he served an answer, "between the hours of 4 P. M. and 6 P. M., by leaving the same in the office of attorney for the plaintiff, in a conspicuous place, the attorney being absent therefrom, and this deponent not knowing the residence of said attorney." The court below denied the motion. The affidavit was not sufficient; for serving by leaving v.53m.—18

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in a conspicuous place in the attorney's office, in his absence, can be made only when he has no clerk therein, and there is no person in charge thereof. 1878 G. S. ch. 66, § 74. And, notwithstanding anything in the affidavit, there may at the time have been in the office a clerk of the attorney, or person having charge thereof, with whom the answer ought to have been left.

Order affirmed.

VANDERBURGH, J., took no part in this decision. (Opinion published 55 N. W. Rep. 44.)

CHARLES C. BOYD vs. LUTHER MENDENHALL et al.

Argued April 25, 1898. Reversed May 11, 1893.

Want of Probable Cause for a Criminal Prosecution.

Where information is given one upon which he institutes a criminal prosecution, and he at the time knows that upon inquiry of certain persons it may be ascertained that no offense has been committed, and there is no difficulty in making, nor other reasons for not making, such inquiry, he is to be charged, on the question of probable cause, with knowledge of such facts as he would have learned had he made the inquiry.

Appeal by plaintiff, Charles C. Boyd, from an order of the District Court of St. Louis County, O. P. Stearns, J., made August 13, 1892, denying his motion for a new trial.

On July 9, 1891, the Motor Line Improvement Company, a corporation, owned section thirty-six (36), T. 51, R. 14, in Duluth. Guilford G. Hartley was president, and Luther Mendenhall and his business partner Hoopes, were general managers of the business of this corporation. On that day plaintiff and his partner Wilbur purchased of the corporation and paid it for the cedar timber on the east one fourth of the section, with the privilege of cutting and removing it. The sale was made at the general office of the corporation in Duluth, by its clerks therein, by authority of the board of directors. Plaintiff employed men and teams, and commenced the work of cutting

and removing this cedar timber. While so at work on August 17, 1889, they were seen by a Mr. Howard, who went to the defendants Hartley and Mendenhall and told them on the street near their office that the men were cutting timber on this land. Without going to the office to inquire if the timber had been sold, they at once took measures to arrest the plaintiff and his men, thinking them to be trespassers. Hartley made complaint in the Municipal Court, a warrant was issued, and plaintiff and his men were arrested and brought in and charged with wrongfully cutting trees on the land of the cor-After being held for about two hours, the facts were learned, and they were discharged and the prosecution dismissed. Plaintiff then brought this action against Mendenhall, Hartley and the corporation, for malicious prosecution. On the trial, plaintiff dismissed the action as to the corporation, and at the close of the evidence the court, on motion of the other defendants, dismissed the action as to them. Plaintiff excepted, moved for a new trial, and being denied, appeals.

Lewis Brownell, for appellant.

The reason for dismissal evidently was that the defendants each testified to want of malice in making the accusation. Malice in the sense of hatred or ill-will is not necessary to be shown to maintain It is submitted that this testimony of defendants, inthe action. stead of controlling this motion, was entitled to no weight at all. They made the accusation without having any facts to raise a presumption or probability of plaintiff's guilt. With every opportunity to ascertain the facts, they made absolutely no effort to ascertain any of the facts in the matter. Howard told Hartley all that Hartley knew or heard on which the accusation was made. When Hartley went to the City Attorney to make the complaint, the Attorney thought the accusation so improbable that he suggested to Hartley that there might be some mistake about it, and asked him if they did not have a permit from somebody, and stated to him it was a little strange that they should be cutting off that amount of timber without authority. Every fact that Howard communicated to Hartley would suggest to any fair-minded person the improbability of the crime, and put the defendants upon inquiry to ascertain the facts, before making the accusation; and they are chargeable with all of the facts bearing upon the guilt or innocence of the accused which they knew, or by reasonable diligence could have found out. Tabert v. Cooley, 46 Minn. 366.

From the willful doing of an injurious act without lawful excuse, the law implies malice, and this, though the defendants supposed they were acting in conformity to law. Judson v. Reardon, 16 Minn. 431, (Gil. 387;) Farnam v. Feeley, 56 N. Y. 451; Chapman v. Dodd, 10 Minn. 350, (Gil. 277;) Bacon v. Towne, 4 Cush. 217.

J. B. Douglas, for respondents.

In actions for malicious prosecution, two things must concur, malice and the want of probable cause. In other words, the plaintiff must show that the prosecution originated in the malice of the prosecutor, and without probable cause. Neither of these is sufficient without the other. It is conceded that there was no actual malice towards the plaintiff in instituting the prosecution. case of the plaintiff must depend upon the malice to be inferred from lack of probable cause. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. Cole v. Curtis, 16 Minn. 182, (Gil. 161;) Casey v. Sevatson, 30 Minn. 516; 2 Greenl. Ev. § 455.

What facts and circumstances amount to probable cause is a question of law. Whether they exist or not in any particular case is a question of fact. Where there is no dispute about the facts, it is the duty of the court, on the trial, to apply the law to them. In this case, there was no dispute about the facts, no conflict in the evidence, no impeachment of witnesses. The Judge was right in assuming to himself to pronounce upon the legal effect of the evidence. Besson v. Southard, 10 N.Y. 236; Stone v. Crocker, 24 Pick. 81.

Hartley says he had no knowledge as to who the parties were; he had no malice; and he was actuated only by a desire to stop the cutting of the timber. To the same effect is the testimony of Mendenhall. The defendants believed the statements of Howard; there was no reason why they should not. There is no question but that they acted in the whole matter in the utmost good faith.

GILFILLAN, C. J. Action for malicious prosecution. trial the action was withdrawn as to the Motor Line Improvement Company, originally a defendant, and the trial proceeded as to the defendants Mendenhall and Hartley, and after the evidence was all in the court dismissed the action as to them. The facts necessary to consider are brief. The Motor Line Improvement Company, a corporation doing business in Duluth, owned a section of land (36) lying within the corporate limits of that city, on which there was standing timber, including some cedar. Hartley was the president of the company and Mendenhall & Hoopes its agents, with authority to sell the timber, and they, or subordinates in their office, having like authority, sold the cedar timber, or "stumpage," as it is called, on the east half of the two easterly quarters of the section to plaintiff's firm, Boyd & Wilbur, and thereupon plaintiff, with several men, went upon the land to cut the cedar timber, and was cutting and hauling it out, when arrested, as hereafter stated. While so cutting, a Mr. Howard met the defendant Hartley upon the street in Duluth, and told him there were some men cutting cedar on the section. As they stood talking together Mendenhall came up, and Howard repeated to him what he had told Hartley, and then, on the suggestion of Mendenhall, he (Hartley) started to make a criminal complaint against the men doing the cutting, not knowing who they were, nor what were their names. He went to the city attorney, whose business it was to conduct proceedings before the municipal court for punishment of crimes committed within the limits of the city, and requested him to draw a complaint, telling him what Howard had said, and also, as was the fact, that Mendenhall had told him no one had a permit to cut the cedar. The complaint was made out, sworn to by Hartley, a warrant issued, and plaintiff and the men working with him arrested, and taken to the police office, and after several hours' detention, it being ascertained upon inquiry that they had a permit to cut the cedar, they were released, and there was no further prosecution. It appears, or at least it was conceded on the argument, that the place where defendants stood in the conversation with Howard was not more than 100 feet from the office of the improvement company and of Mendenhall & Hoopes, its agents, who, or whose subordinates, had sold the cedar timber to Boyd & Wilbur. It must be presumed that by going to that office and inquiring the defendants would have learned that a permit had been given. They knew there were those employed in the office who had authority to issue a permit, and no excuse is suggested for failure to make such inquiry. The circumstances of the cutting and hauling as stated to them by Howard, it being done openly and without any attempt at concealment, ought to have suggested to them to make such inquiry at least as lay right at their hands, before proceeding to the extreme measure of beginning a criminal prosecution.

There are in the books many definitions of probable cause to institute a criminal prosecution. A very concise one is given in *Munns* v. *Dupont*, 3 Wash. C. C. 31, and quoted and approved by this court in *Cole* v. *Curtis*, 16 Minn. 182, (Gil. 161,) as follows: "A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."

What facts and circumstances amount to probable cause is a question of law; whether they exist in the case is a question As to what facts and circumstances existed in this case there is no dispute, so that whether there was probable cause was to be determined by the court. The facts were the information given defendants by Howard that there were men cutting and hauling off the cedar, the fact that Mendenhall & Hoopes and subordinates in their office had authority to grant permits, which the defendants must be presumed to have known, and that without excuse for omitting it defendants made no inquiry there. To make inquiry at the office was so easy to do that no cautious man having any regard for the rights of others would have been warranted, without such inquiry, in jumping to the conclusion that the men mentioned by Howard were committing a criminal offense. being no reason, of difficulty or otherwise, why they should not have made the inquiry, it was their duty to make it, and they are to be charged on the question of probable cause with what they would have learned had they made it,—presumably the fact that a permit had been issued.

Advice of counsel will protect one in bringing a criminal prosecution only when given after a full statement of the facts and circumstances known to him, or of which he has been informed. Hartley

made no such full statement to the city attorney. He did not inform that officer that there were others than himself and Mendenhall who had authority to issue permits, and that no inquiry had been made to ascertain if they had issued a permit. It is apparent from the testimony of the city attorney what effect that information would probably have had on the advice given, for he says: "When he said it was being hauled out, and in large quantities, I suggested to him that it seemed as if they must have some permit from somebody."

The case ought to have been left to the jury. Order reversed.

Vanderburgh, J., absent. (Opinion published 55 N. W. Rep. 45.)

STATE ex rel. IBA P. SHISSLER vs. JEROME E. PORTER.

Argued April 25, 1893. Decided May 19, 1898. •

Special Laws Held Unconstitutional.

In so far as they relate to the term of office of the judge of the municipal court for the city of Mankato, Sp. Laws 1887, ch. 8, Sp. Laws 1889, ch. 12, and Sp. Laws 1891, ch. 47, are unconstitutional and void.

The Subject not Expressed in the Title.

The subject of the attempted legislation is not expressed in the titles to these laws, as required by the Constitution, art. 4, § 27.

On April 14, 1893, Ira P. Shissler, presented in this court his petition stating in substance that on April 4, 1893, he was elected Judge of the Municipal Court of Mankato, a court created by Sp. Laws 1885, ch. 119. That he had received a certificate of election and had qualified as Municipal Judge, but was prevented by Jerome E. Porter, the prior incumbent, from taking possession of the office. A writ of Quo Warranto issued, and the respondent showed cause April 25, 1893. The Act creating the court provided that the Municipal Judge should hold his office for the term of three years.

Porter was elected Judge in April, 1888, and re-elected in April, 1891. This term would not expire until April, 1894, but the relator claimed that the term of the office had been changed to two years, by Sp. Laws 1891, ch. 47, subch. 2, § 2, and expired April 10, 1893. The respondent claimed that this Act, so far as it attempted to change his term of office, was invalid, because that subject was not expressed in its title, as required by the Constitution, art. 4, § 27. He also claimed that Sp. Laws 1887, ch. 8, and Sp. Laws 1889, ch. 12, in so far as they attempted to alter the term of office of the Municipal Judge, were invalid for the same reason. This was the only question discussed on the argument.

Lorin Cray and Wm. N. Plymat, for relator, cited Supervisors of Ramsey Co. v. Heenan, 2 Minn. 330, (Gil. 281;) State v. Cassidy, 22 Minn. 312; State ex rel. v. Smith, 35 Minn. 257; and Johnson v. Harrison, 47 Minn. 575.

Pfau & Young, for respondent.

Collins, J. The relator seeks by this proceeding to obtain immediate possession of the office of judge of the municipal court of the city of Mankato; he having been elected to that office at the city election held April 4, 1893. His claim is that the term of office of the respondent—who was last elected to the same office at the election held in 1891, duly qualified, and has since discharged the duties—expired on Monday, the 10th day of April, 1893. The question is whether the respondent's term of office is two or three years.

The facts are that the city of Mankato was chartered and organized long prior to the year 1885. A municipal court for the city was created by Sp. Laws 1885, ch. 119; the same being an act of the legislature entitled "An act to establish a municipal court in the city of Mankato, Blue Earth county, Minnesota." This was an independent act, providing for the establishment of the court, and defining its powers and jurisdiction, and was similar in all respects to like acts which have passed the legislature from time to time under the authority of that section of the constitution which provides for certain named courts, and for the creation of "such other courts, inferior to the supreme court, as the legislature may " " establish by a two-thirds vote." It is conceded that this act has

never been referred to directly by the legislature, except in an amendatory act now known as Sp. Laws 1887, ch. 78, the amendment relating simply to the salary of the judge of the court.

By the original enactment, Sp. Laws 1885, ch. 119, § 2, it was provided that the qualified electors of the city of Mankato, at the city election to be holden on the first Tuesday in April of that year, and on the day of the city election every third year thereafter, should elect a judge of the court, who should hold his office for the term of three years, and until his successor was elected and qualified. By section 3 it was provided that there should also be elected a special judge of said court, whose manner of election, term of office, powers, duties, and qualifications, should be the same as those of the judge. Both of these officers were required to be residents and qualified electors of the city, persons learned in the law, and duly admitted to practice as attorneys in this state.

By the terms of sections 2 and 3, vacancies in either of these offices were to be filled by appointment by the governor; the appointees to be qualified persons, and to hold office until the next annual city election occurring more than thirty days after the vacancy should have happened, when a judge or a special judge, or both, as the case might be, should be elected for a term of three years. We call attention to some of these provisions for the purpose of showing the painstaking care of the legislature when establishing the court, which is a court of record, having civil jurisdiction in cases where the amounts in controversy do not exceed \$500. Its criminal jurisdiction is that of a justice of the peace, and is exclusive in the city.

The respondent was first elected in April, 1888. There was no attempt made to elect a municipal judge from that time until the annual city election of 1891, when he was re-elected, as before stated. So it will be seen that respondent held the office for three years under his first election.

In the year 1887 an act was passed, (Sp. Laws 1887, ch. 8,) entitled "An act to amend and consolidate the charter of the city of Mankato, state of Minnesota." This was really a new charter for the city. We find no reference to the municipal court, or the judges thereof, except in subch. 2, § 2, where it is provided that the elective officers of the city shall be a mayor, a municipal judge, treasurer,

and city recorder. The recorder and treasurer are to be elected for two years, and "all other elective officers " " shall hold their offices for one year, or until their successors are elected and qualified." There was also a provision which had the effect to continue in office all persons then holding office under the prior charter until the expiration of the terms for which they were elected or appointed.

It is claimed by the relator that by this act the term of office of municipal judge was reduced from three years to one, and that, when respondent was elected in 1888, he was elected for but one year.

In the year 1889 various amendments were made to the act of 1887, by an act entitled "An act entitled 'An act to amend the charter of the city of Mankato in the state of Minnesota," now Sp. Laws 1889, ch. 12. In section 2 of the act the elective officers of the city—mayor, municipal judge, etc.—were named, the same as in section 2 of the statute of 1887. An election was provided for the year 1889, and for every two years thereafter, and the term of office of every officer elected under the act was to commence on the second Tuesday of April of the year in which he was elected, and was to continue for two years. The only substantial change in the amendment of 1889, relating to elections or terms of office, was to substitute biennial for annual elections, and to make the terms of office for the respective officers two years, instead of one. It will have been noticed that a municipal judge was not elected in 1889.

In the year 1891, Sp. Laws 1891, ch. 47, another act was passed, entitled "An act to amend chapter 8 of the Special Laws of the State of Minnesota for the year 1887, entitled 'An act to amend and consolidate the charter of the city of Mankato, state of Minnesota,' as amended by chapter 12 of the Special Laws of the State of Minnesota for the year 1889, entitled 'An act entitled an act to amend the charter of the city of Mankato, in the State of Minnesota.'"

This was, in substance, as was chapter 8, supra, a new charter. An election was provided for the first Tuesday in April, 1891, and every two years thereafter. The elective officers were to be a mayor, municipal judge, a special judge, treasurer, and recorder. These officers, it was provided, should be elected for two years, and until their successors were elected and qualified. The municipal court

was not mentioned in this act, nor were the judges thereof, except as above stated.

Our attention has not been directed to any other legislation bearing upon the subject, and the relator rests his claim to immediate possession of the office on the amendatory statutes of 1887, 1889, and 1891, before mentioned, and in which he contends the term of the office in question was first reduced to one year, to take effect in the year 1888, when respondent was first elected, and then enlarged to two years, taking effect, as to respondent's second term, in the year 1891, when he was last elected.

It is the position of the respondent that the term of the judge of the municipal court, as fixed by the act of 1885, establishing the court, has not been changed or shortened by the so-called amendatory acts, because, if the language used therein could be given that effect, it would prove ineffectual; the subject-matter of such legislation not having been expressed, it is claimed, in the title to either of these various acts, as required by Constitution, art. 4, § 27, which provides that no law shall embrace more than one subject, which shall be expressed in its title.

The main argument of counsel for the relator seems to be based upon their contention that the act of 1885, establishing the court, was an amendment to the then existing city charter, and upon its passage became incorporated into and a part of it, so that the subsequent enactments of the legislature amendatory of the charter affected the act. The city charter was not mentioned, and to create this court it was not necessary that it should be. That such an act might be styled as amendatory of a charter, or might be made a part of a city charter, either originally or by legislation subsequent to the granting of corporate powers, we do not now question, although the policy and wisdom of establishing such tribunals by independent and distinctive legislation are strongly suggested by the fact that they can only be lawfully created, under the constitution, by a two-thirds vote of the legislature, while acts relating to offices purely municipal need but a majority vote. But we are not to consider what might have been enacted as a part of the original charter, but what was enacted; so that, taking it for granted that a municipal court might have been provided and created in the charter act, without special reference to such court in the title, it was not. The city charter was wholly silent on the subject, and covered only such subjects as are ordinarily found in a charter. Nor was there anything in the act of 1885, establishing the court, indicating an intention to add it to, or make it a part of, the charter, or to amend any of the charter provisions; and whether that could have been done legally, under its title, may well be questioned. Of course the functions of the newly-constituted court were to be exercised within the limits of the municipality; and it was established, undoubtedly, at the instance and for the convenience of its residents. That its judges were to be chosen by ballot, by and from among the electors of the city, and that the city recorder was to be clerk of the court, was not significant, or of any greater effect than would have been a requirement that from among the qualified electors of the city the governor should appoint those officers. These provisions simply pointed out, and specified, the means and methods by which the court was to be equipped with its proper complement of officials.

Prior to the passage of Sp. Laws 1885, ch. 119,-an act to establish a municipal court in the city of Mankato, according to its title, -that city had been chartered by the legislature. The act or bill for the charter was full and complete, and the subject embraced therein was tersely, but clearly, expressed in its title. It is probable that the subject-matter covered by said chapter 119 might have been incorporated into this original legislation, or, with a proper and suggestive title, the act creating the court might have been lawfully passed as an amendment to the charter. But this was not the course which was pursued. Instead of adopting a title which would have indicated a purpose to amend the charter, or make the new law a part of it, the exact object of the legislation was expressed. Two laws were then in force, separate and distinct enactments,—one creating and chartering a city, but making no provision for a municipal court, nor was it essential that it should; the other establishing such a court, and not referring at all to the city charter. The fact that the law establishing a judicial tribunal might have been made a part of the charter originally, or by amendment, does not affect the fact that such was not the course of the legislature. Nor can it have weight when considering the legislation through which it is urged the term of

office of the municipal judge, as fixed in chapter 119, has been reduced to the term of two years.

The constitutional requirement as to the entitling of laws has often been discussed in the opinions of this court. The substance of what has been said, so far as we need to repeat it at this time, is that an amendatory law is for the amendment, not of what might have been enacted under the title of the original statute, but of what was enacted. Hence the sufficiency of the title of an act merely declared to be amendatory of a prior law, to justify the legislation which may be enacted under it, depends, not alone upon the fact that the title of the original statute was so comprehensive that the legislation in question might have been properly enacted in such prior law, but it depends also upon the nature and extent of the prior enactment, to amend which is the declared purpose or subject of the later act. And when the title of an act is such that the legislature can be deemed to have been fairly apprised of its general character by its subject, as expressed in such title, and all the provisions of such act have a just and proper reference thereto, and are such as, by the nature of the subject so indicated, are manifestly appropriate in that connection, and might reasonably be looked for in a measure of such a character, the title is sufficient. State v. Cassidy, 22 Minn. 312; State v. Klein, Id. 328; State v. Smith, 35 Minn. 257, (28 N. W. Rep. 241.)

Applying this language to the case at bar, it will be seen that it is of no materiality that the matter found in and covered by the act establishing the court might have been germane to the subject embraced in the original charter, and have been sufficiently expressed in the title to that law, for the nature and extent of the charter itself must be consulted. And when we are examining the title to the amendatory act of 1891, under which relator claims his right to immediate possession of the office, and the titles to the acts of which that was an amendment, we are to inquire whether the legislators were fairly informed by such titles of the nature and character of the proposed legislation. In view of the independent charter provisions in existence at the time of the enactment of the law establishing the court, and the title of that law, would amendments to the latter be looked for in measures which, if dependence could be placed upon their titles, related solely to the

charter? We think not. The titles to these amendatory acts, if the legislation embraced therein was designed to affect the provisions of chapter 119, were very misleading, and well calculated to accomplish the mischief the constitutional requirement was expressly designed to prevent. As the subject of that part of the legislation heretofore referred to in Sp. Laws 1887, ch. 8, Sp. Laws 1889, ch. 12, and Sp. Laws 1891, ch. 47, was not expressed in the titles of either of these acts, the term of office of the judge of the municipal court for the city of Mankato remains at three years.

Order to show cause discharged.

Vanderburgh, J., absent, took no part herein. (Opinion published 55 N. W. Rep. 184.)

RUBY D. TEMPLE vs. MARY L. NORRIS.

Argued May 8, 1898. Decided May 19, 1893.

Service of Summons in a Civil Action.

A person who has attained the age of fourteen is at years of legal discretion, and *prima facie* is a person of "suitable age and discretion," within the meaning of 1878 G. S. ch. 66, § 59, subd. 4, regulating the manner of the service of a summons in a civil action.

Appeal by plaintiff, Ruby D. Temple, from an order of the District Court of Hennepin County, *Thomas Canty*, J., made September 17, 1892, sustaining a demurrer to her complaint.

Plaintiff owned lot six (6) in block two (2) in Dunsmoor's Rearrangement of the Second Nicollet Avenue Addition in Minneapolis. She mortgaged it November 8, 1890, to John P. Pineo, to secure the payment of \$1,300 three years thereafter, with interest payable semi-annually. The mortgage provided that, if any installment of interest remained past due and unpaid for sixty days, the principal also should be due and payable. The mortgage also contained a power of sale on default in payment. Pineo assigned the mortgage February 14, 1891, to the defendant, Mary L. Norris. The first in-

stallment of interest was not paid, and on September 1, 1891, the mortgage was foreclosed, and the lot sold by the sheriff under the power, to the defendant for the whole amount secured, with interest and costs.

This action was brought September 3, 1892, to set aside this foreclosure. The plaintiff in her complaint stated that the notice of sale was not served on the person in possession of the mortgaged premises. That the house thereon was occupied by her tenant, A. P. Lyon, and his family. That one Theodore Dahl, a deputy sheriff, on July 30, 1891, at the house, handed a copy of the notice to Fannie Lyon, the tenant's daughter, fourteen years of age, then resident therein. That she was wholly unaccustomed to, and unfamiliar with, business transactions and all legal proceedings. That she was not of suitable age or discretion. That she was then wholly incapable of understanding and comprehending the nature and gravity of the transaction, and did not understand or comprehend the nature or gravity thereof, and that in fact she did not give the notice to said A. P. Lyon, or call his attention thereto.

The defendant demurred to the complaint. The demurrer was sustained, and plaintiff appeals.

J. F. Keene, for appellant.

The facts in regard to the manner of service of the notice of foreclosure sale on the occupant of the mortgaged premises, as stated in the complaint and admitted by the demurrer, are sufficient to show that the service contemplated by the statute was not made.

It was not necessary for plaintiff to offer to pay the debt secured, to obtain relief from an invalid foreclosure of the mortgage.

Stocker & Matchan, for respondent.

1878 G. S. ch. 81, § 5, provides that this notice shall be served in like manner as a summons in civil actions in the District Court. A summons may be served upon the defendant by leaving a copy at the house of his usual abode with some person of suitable age and discretion then resident therein. 1878 G. S. ch. 66, § 59. This notice was served by leaving a copy at the house upon the premises, with Fannie Lyon, of the age of fourteen years, and a resident therein. A person of suitable age and discretion, upon whom a sum-

mons or notice can be served, need not be accustomed to business or acquainted with legal proceedings.

In her application for relief, the plaintiff must tender payment of the interest due, or show her readiness to pay it. Abbott v. Peck, 35 Minn. 499; Scott v. Austin, 36 Minn. 460; Hatch v. De La Garza, 7 Tex. 60.

Collins, J. But one feature of the complaint in this action need be considered. It was therein alleged that the only person upon whom a copy of the foreclosure notice was served was but "fourteen years old, and no more, and was wholly unaccustomed to, and unfamiliar with, business transactions and all legal proceedings, and that she was not of suitable age or discretion; that she was then wholly incapable of understanding and comprehending the nature and gravity of the transaction, and did not understand the nature or gravity thereof."

The statute does not, in terms, require that service shall be made by leaving a copy of the notice with a person accustomed to, or familiar with, business transactions or legal proceedings, or with a person who is capable of understanding and comprehending the nature and gravity of the transaction, or who does understand and comprehend it. It does require that the person with whom a copy is left, when service is made at the house of the usual abode, shall be of suitable age and discretion. 1878 G. S. ch. 81, § 5, and Id. ch. 66, § 59, subd. 4.

Now it should not be inferred that because the person with whom the copy was left was unfamiliar with, and unaccustomed to, business transactions and legal proceedings, and because she did not understand and comprehend what counsel terms the gravity of the transaction, that she was not a person of suitable age and discretion, within the meaning of the statute. This same charge might easily be made with regard to many adults, so that the allegation, when analyzed, really amounts to nothing more than charging that because the girl, who was the daughter of the occupant of the mortgaged premises, was but fourteen years of age, she was not of suitable age and discretion. There is no averment in the complaint that she was not ordinarily intelligent, and in full possession of her faculties, and we must therefore presume that she

was as well informed, and as capable, as the ordinary female of the age of fourteen years. At common law, on the attainment of this number of years, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes them, at those years, to be capable of crime. 1 Hale, P. C. 25; Bac. Abr. "Infancy," A, H. By the terms of our Penal Code, (section 17,) a child of the age of seven, and under the age of twelve, years, is presumed incapable of crime, but even this presumption may be removed by proof of sufficient capacity. At common law a female of the age of fourteen is at years of legal discretion, and may choose a guardian. 1 Bl. Comm. 463. By our statute the right to nominate a guardian is conferred upon an infant of the age of fourteen. And the summons in a civil action is to be served upon an infant defendant when fourteen years of age or upwards,-not upon a guardian. These statutory provisions indicate that a person who has attained the age of fourteen is at years of legal discretion, and, it must follow, of suitable age and discretion, in the contemplation of the statute regulating the service of the notice of foreclosure. There is no requirement that the notice must be left in the hands of a person of full age. pleading stated Miss Lyon to have been fourteen years of age, and failed to allege that she was not ordinarily intelligent and capable, and in full possession of all her faculties, or to negative in any other manner the presumption before referred to, the demurrer was Of course the bare averment that she was not a person well taken. of suitable age and discretion was a mere conclusion of law.

On the other point argued by counsel, we call attention to Knappen v. Freeman, 47 Minn. 491, (50 N. W. Rep. 533.)

Order affirmed.

VANDERBURGH, J., took no part in this case.

(Opinion published 55 N. W. Rep. 188.) v.53m.—19



CHARLES E. SEELEY vs. J. F. KILLORAN et al.

Argued April 24, 1898. Decided May 19, 1898.

Appeal from County Canvassing Board of Elections.

An election contest over a county office, conducted under the provisions of Laws 1891, ch. 4, must be instituted by an appeal from the decision of the board of canvassers to the District Court, taken within the time and in the manner prescribed in section 76 of said chapter. If the notice of appeal therein mentioned is not entered with the clerk within twenty days after the day of election, the District Court acquires no jurisdiction of the proceeding.

Appeal by plaintiff, Charles E. Seeley, from an order of the District Court of Itasca County, Geo. W. Holland, J., made March 17, 1893, refusing his motion for a new trial.

At the general election held November 8, 1892, Charles E. Seeley and J. F. Killoran were each candidates for the office of County Commissioner for the Second District in the County of Itasca, for the term commencing January 1, 1893. The Board of Canvassers of that county met and adjourned from day to day until November 17, 1892, when they determined and announced that Seeley received one hundred and ninety-nine (199) votes and Killoran two hundred and fourteen (214) votes, and that Killoran was elected. Seeley charged that in Swan River election district, forty transient men and boys, not qualified electors, but who were temporarily employed in constructing a railroad just over the line in Aitkin County, were permitted to vote and did vote for Killoran, and their votes were counted and included in his 214 votes. That the judges in that election district were not sworn, or the ballot boxes sealed.

On December 3, 1892, notice of contest and a copy of a summons and complaint were served on defendants, J. F. Killoran and H. R. King, County Auditor, and the originals filed in the office of the Clerk of the District Court. The defendant Killoran answered. King did not. The issues came to trial January 19, 1893, at Grand Rapids. Defendant Killoran moved the court to dismiss the proceeding on the ground that the notice of contest was not filed with the Clerk of the Court within twenty days after the day of the elec-

tion. Laws 1891, ch. 4, § 76. The court granted the motion, plaintiff excepted, moved for a new trial, and being denied, appeals.

True & Weatherby, Hawkins & McCarthy, and Choate & Merrill, for appellant.

By Laws 1891, ch. 4, § 76, an appeal and a contest are not nec: essarily connected. A complete and independent proceeding is provided for contesting elections without reference to whether an appeal from the Canvassing Board is taken or not. In Baberick v. Magner, 9 Minn. 232, (Gil. 217,) the court felt obliged to make the contest of an election depend upon an appeal having been taken. Otherwise they would have to charge the Legislature with the inconsistency of permitting the contestant to gain the advantages of an appeal after the time for an appeal had passed; but in the absence of any statute requiring a contest to depend upon an appeal being taken, the court cannot require a contest to rest upon an appeal, without charging the Legislature with a much greater inconsistency than the one referred to in Baberick v. Magner, supra. The duties of the Canvassing Board are merely ministerial. Board has no judicial power, cannot go behind the returns, cannot question the legality of a single vote, or investigate any of the many other questions which may be raised upon a contest; it simply makes a computation from the face of the returns and declares the result. State v. Steers, 44 Mo. 223; O'Ferrall v. Colby, 2 Minn. 180, (Gil. 148;) Taylor v. Taylor, 10 Minn. 107, (Gil. 81;) Stevenson v. Lawrence, 1 Brews. 67; Handy v. Hopkins, 59 Md. 157.

Laws 1891, ch. 4, § 74, does not require the Canvassing Board to commence the canvass of the returns until the tenth day after the election. Section 80 of the same chapter contains a provision not formerly in the law, viz. that the Board may adjourn from day to day, not to exceed ten days. These provisions give the Board the full twenty days after the votes are cast in which to canvass the returns, while § 76 provides that notice of appeal must be entered within twenty days after the day of election. The question then arises, what is meant in this statute by "the day of election?" It has been held with great reason that since it cannot be officially declared who is elected until after the declaration of the Canvass-

ing Board has been made, the time for an appeal begins to run from, and the day of election means, the date of the declaration of the result of the election by the Canvassing Board. Davis v. Maxwell, 22 La. An. 66; Stevenson v. Lawrence, 1 Brews. 67; Dagget v. Hudson, 43 Ohio St. 548; Borer v. Kolars, 23 Minn. 445.

Draper, Davis & Hollister, for respondent.

The precise question in this case was before the court and decided in *Baberick* v. *Magner*, 9 Minn. 232, (Gil. 217,) and *Borer* v. *Kolars*, 23 Minn. 445.

The word election is clearly intended to designate the day the votes are cast. To construe the word election in Laws 1891, ch. 4, § 76, to mean after the result is officially determined, would be judicial legislation.

Upon the point that no appeal is necessary in order to contest an election, counsel have made an ingenious argument based upon a slight difference in the reading of the Laws of 1861 and 1891, and like counsel in *Borer* v. Kolars, 23 Minn. 445, have sought to distinguish the case from Baberick v. Magner, supra. The reasoning of the court in Borer v. Kolars, supra, meets the argument of counsel in this case, and exposes it as the merest sophistry.

In Laws 1891, ch. 4, the sections 76 and 95 sustain the same relation to each other as did sections 31 and 52 in Laws 1861, ch. 15, and the construction given to the latter in *Baberick* v. *Magner*, supra, should govern in construing the election law of 1891.

In this case, through the neglect of some one, the proper notice was not entered with the Clerk, and now this contestant asks the same privileges that he would have been entitled to if he had complied with the law.

Collins, J. This was a proceeding to contest an election for a county office, and was dismissed by the District Court upon the ground that notice of appeal from the decision of the county canvassing board had not been entered with the clerk of said court within twenty days after the day of election, as provided by Laws 1891, ch. 4, § 76. In the case of Baberick v. Magner, 9 Minn. 232, (Gil. 217,) it was held that the statute then in force—the act of

March 12, 1861—provided but one way of instituting an election contest, and that was by appeal to the District Court from the decision of the board of canvassers, as provided by Laws 1861, ch. 15, § 31, and that, unless an appeal was taken by notice thereof entered with the clerk of the proper District Court within twenty days after the day of election, the court acquired no jurisdiction whatever of the proceeding.

The sections of the act of 1861 which related to the question then before the court were section 31, before mentioned, and sections 49 and 52, which authorized and provided the method for conducting the contest. The corresponding sections in the Revision, 1866 G. S. ch. 1, were §§ 29 and 49. Section 29 provided for the entry of a notice of appeal with the clerk of the court within twenty days from the day of election in case of a contest, while section 49 specified the method to be pursued in prosecuting the contest. The only material change effected in the original sections by the Revision of 1866 consisted in an omission from section 29 of the provision found in section 31 of the act of 1861, relating to an appeal to the proper branch of the legislature from a decision of the canvassing board relative to the election of senators and representatives. This was so declared in Borer v. Kolars, 23 Minn. 445, in which the necessity of entering a notice of appeal with the clerk of the court under the provisions found in the Revision of 1866 was considered, and it was held that sections 29, 46, and 49 of chapter 1 of the Revision sustained the same relation to each other as did the corresponding sections in the act of 1861, and also that the construction given to the latter in Baberick v. Magner, must govern when construing the latter. The order appealed from, dismissing the proceeding because notice had not been entered within twenty days as provided for in said section 29, was affirmed.

In the statute which controls this case we find similar provisions, (Laws 1891, ch. 4, §§ 76, 91, 95.) Section 76 is substantially a re-enactment of section 29 of the Revision, and provides that at the close of the labors of the canvassing board it shall declare the person having the highest number of votes for any county office duly elected, subject to an appeal to the District Court of the proper county, and that, in case of an appeal, notice thereof must be entered with the clerk of said court within twenty days after the day

of election; while sections 91 and 95 are substantially re-enactments of sections 46 and 49 of the Revision of 1866, authorizing the contest, and providing the course of procedure. There is nothing elsewhere in the general election law of 1891 which suggests that it was the intention of the legislature to confer jurisdiction upon the District Court in contested election cases instituted under that law, except as prescribed in section 76; and similar statutory provisions had theretofore been construed by this court as going to the jurisdiction of the court to entertain the case at all. The provisions of the act of 1891 in reference to contests must be construed with reference to decisions upon like enactments. The reasoning in Borer v. Kolars, supra, completely covers the main points made on the appeal, and cannot be improved upon.

Relator's counsel argue that the words in section 76, "within twenty days after the election," should be construed as meaning within twenty days after the result of the election is officially declared by the board of canvassers, because of a provision providing for an adjournment of the board from day to day for a period not exceeding ten days. To disregard the plain language in section 76, and give it the construction asked for by counsel, would be the rankest kind of judicial legislation. It is not capable of any such interpretation.

The District Court failed to acquire jurisdiction of the contest, and its order dismissing was correct.

Order affirmed.

Vanderburgh, J., absent. (Opinion published 55 N. W. Rep. 132.)

HENRY W. MERCHANT et al. vs. ROBERT R. HOWELL et al.

53 295 69 259

Submitted on briefs April 27, 1893. Decided May 19, 1893.

Ambiguous Contract Construed from Extrinsic Circumstances.

Defendants ordered from plaintiffs "600 2-inch boiler-flue ferrules; 1,500 2½-inch; and 1,200 3-inch. This is outside diameter." Held, that it was competent to show, for the purpose of explaining the meaning of the order, that, in the trade in which both parties were engaged, boiler-flue ferrules are standard articles of common use, and that it was the general custom to designate them by the size of the flues on which they were to be used; also that boiler flues are always manufactured in certain regular and standard sizes of exact outside diameters, and that, if the dimensions named in the order were to be applied to the ferrules, and not to the flues, the ferrules could not be used as "boiler-flue ferrules."

Appeal by plaintiffs, Henry W. Merchant and Clarke Merchant, from an order of the District Court of Hennepin County, *Frederick Hooker*, J., made March 11, 1892, granting a new trial on motion of the defendants, Robert R. Howell and David R. Howell.

The plaintiffs deal in metals, brass and copper goods at Philadelphia, Pa. Defendants deal in supplies for engines, boilers and machinery at Minneapolis. On December 5, 1889, defendants wrote plaintiffs as follows:

"Please enter our order for 600—2 inch boiler flue ferrules; 1,500—2½ inch and 1,200—3 inch. This is outside diameter. All to be 18 stub guage and ½ inch long, to be shipped to us by freight June 1st next."

Plaintiffs sent seamless drawn copper ferrules of these outside diameters. Defendants refused the goods, claiming the ferrules were ordered to repair and go over boiler flues of the outside diameters specified. This action was to recover the purchase price and was tried November 17, 1891. The plaintiffs claimed that the order meant the outside diameter of the ferrules, not the outside diameter of the boiler flues; and that the mistake was defendants'. On the other hand, the defendants claimed the diameters mentioned in the order were the outside diameters of the boiler flues, that these ferrules were to repair. Defendants proved that boiler flues are manufactured in regular and standard sizes of

 $1\frac{3}{4}$, 2, $2\frac{1}{4}$, $2\frac{3}{4}$, $3\frac{3}{4}$ and 4 inches outside diameter, with no intermediate sizes, and that the copper ferrule for repairing must be of the same diameter inside, and that it was so understood in the The plaintiffs proved that an order for copper or brass tubes of a certain diameter meant in the trade, outside diameter, and that the rule prevailed, although the tube should be cut into short pieces forming ferrules merely. Defendants also claimed damages on account of delay in shipment of the ferrules. plaintiffs contended that the delay in shipment was waived. At the close of the evidence, the court directed the jury to return a verdict for plaintiffs, for the price of the goods and interest. fendants excepted and moved for a new trial. The court granted it, being convinced, on reflection, that the outside diameters mentioned in defendants' order were meant to be that of the boiler flues, not of the ferrules, and that the case should have been submitted to the jury on the question whether or not there was a custom of the trade in regard to these diameter measurements. tiffs appeal.

Geo. F. Edwards, for appellants.

No technical, trade, or art words, phrases or expressions are used in the letters which constitute the contract for the ferrules; none ambiguous, none of doubtful, uncertain or varying sense or mean-The contract is clear, plain and complete. It leaves nothing indeterminate, nothing to be implied or presumed, and therefore the force and effect of the evidence of custom would have been to vary, to contradict the plainly expressed terms of the contract. The true office of usage or custom is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contract, arising not from express stipulations, but from mere implications and presumptions;—to ascertain the true meaning of a particular word, or particular words, in a given instrument, where it or they have various senses, some common, some qualified and some technical. The Schooner Reeside, 2 Sumn. 569; Swett v. Shumway, 102 Mass. 365; Park v. Piedmont & A. Life Ins. Co., 48 Ga. 601; Brown v. Brown, 8 Met. 573; Manson v. Grand Lodge, 30 Minn. 509; Barnard v. Kellogg, 10 Wall. 383; Simmons v. Law, 3 Keyes, 217; Beyerstedt v. Winona Mill Co., 49 Minn. 1; Thompson v. Libby, 34 Minn. 374; McCormick H. & M. Co. v. Thompson, 46 Minn. 15.

The use for which the ferrules were designed is immaterial, as plaintiffs made and furnished the articles of the specific measures, kinds, qualities, etc., ordered. Goulds v. Brophy, 42 Minn. 109. Plaintiffs were not dealers in boilers or boiler flues, but it is urged that because they furnish ferrules for boiler flues, they must have known there were no standard flues these ferrules would fit.

The terms of the written contract were plain and explicit, its meaning was a question of law, and the evidence of custom, immaterial. Worcester Medical Institution v. Harding, 11 Cush. 285; Short v. Woodward, 13 Gray, 86; Nash v. Drisco, 51 Me. 417; Woodman v. Chesley, 39 Me. 45; Streeter v. Streeter, 43 Ill. 155; Lamb v. Henderson, 63 Mich. 302; Ledyard v. Hibbard, 48 Mich. 421; Adams v. Pittsburg Ins. Co., 76 Pa. St. 411.

Hart & Brewer, for respondents.

The controversy is whether the intention of the parties is to be arrived at from the correspondence constituting the contract alone, or can extraneous evidence of the surrounding circumstances be considered. It is a rule of interpretation that the intention of the parties to a contract is to be ascertained by applying its terms to the subject matter. The admission of parol testimony for such purpose does not infringe upon the rule which makes a written instrument the proper and only evidence of the agreement contained in it. Sweet v. Shumway, 102 Mass. 365; Bradley v. Washington, A. & G. S. P. Co., 13 Pet. 89; Merriam v. United States, 107 U. S. 437; Reed v. Insurance Company, 95 U. S. 23; United States v. Peck, 102 U. S. 64; White's Bank v. Myles, 73 N. Y. 335; Blossom v. Griffin, 13 N. Y. 569; Miller v. Stevens, 100 Mass. 518; Macdonald v. Longbottom, 1 El. & El. 977.

It is obvious from the correspondence that what the parties were contracting about was boiler flue ferrules. The evidence which was offered by the defendants, and received by the court, conclusively showed that boiler flues were manufactured in certain regular and standard sizes of the exact outside diameter mentioned in the several letters, and that the articles to be furnished

would not be boiler flue ferrules, and could not be used as such, if the dimensions specified were to be applied to the ferrules and not to the flues.

If the foregoing contention as to the proper construction of the contract, as applied to its subject matter, is correct, it disposes of the plaintiff's claim. If it is not correct, it leaves for consideration the question of usage or custom and the evidence applicable thereto. It is competent to show that, by the general usage of a particular trade or business, particular words or phrases have a generally understood and accepted meaning. Within this rule the defendants introduced testimony tending to show that there was a general usage or custom in this particular business, by which all attachments or fixtures pertaining to boiler flues, such as expanders, flue cleaners and ferrules were uniformly designated by the size of the flues in connection with which they were to be used.

Collins, J. The real controversy between the parties to this action is whether the defendants' written order for boiler-flue ferrules, which plaintiffs undertook to fill, was, and should have been so understood, for ferrules of the dimensions specified, outside diameter measurements, the gauge thickness being about 1-18 of an inch, or for ferrules which would fit upon and over boiler flues of these diameter measurements, outside. The defendants contend that their order for "600 2-inch boiler-flue ferrules; 1,500 23-inch; and 1,200 3-inch. This is outside diameter,"—was plain and unambiguous, and that the specified dimensions clearly referred to the flues, not to the ferrules; while plaintiffs insist with equal positiveness and confidence that the order plainly stated what the diameters of the ferrules, outside measurements, should be, not the diameters of the flues for which they were intended. And counsel upon either side have demonstrated the correctness of their respective positions—to their own satisfaction.

The court below conducted the trial upon the theory that the language used in the order was of doubtful construction, and, plaintiffs objecting, allowed defendants to show by competent witnesses which interpretation would have been put upon it, and how it would have been construed, generally, by persons engaged in the trade.

Testimony upon the same point was produced by plaintiffs, and, it seems almost needless to remark, the witnesses differed as to how the language of the order should have been understood and construed by those who dealt in such articles. The court also allowed defendants to show, plaintiffs objecting, that all boiler flues are made in standard sizes, and that the ferrules furnished in accordance with plaintiffs' construction would not fit upon any of these standard sizes. In fact, plaintiffs seem to have admitted this, for in all of their communications with defendants since the latter advised them of the alleged mistake they have spoken of the ferrules as worthless, except as scrap metal. After receiving the testimony above mentioned, and by which a very grave doubt had been raised as to how the order should have been construed, if none had before existed, the court, upon its motion, directed a verdict for plaintiffs for the contract price of the goods, and such a verdict was returned. Later the court granted the defendants' motion for a new trial, on the ground that it ought not to have taken the case from the jury, and the present appeal is from the order granting a new trial.

We do not agree with the claim made by plaintiffs' counsel that the language used in the order was so plain and clear as to warrant but one construction of it, and that the one which his clients placed upon it. If, then, there was a doubt whether on the face of the order it should have been interpreted by them, as it evidently was, when filled, they have no cause to complain of the rulings of the court respecting the admissibility of testimony tending to explain the language, or of the order granting a new trial. ject-matter of the contract was boiler-flue ferrules, not ferrules. was shown that boiler-flue ferrules were articles in common use, and that plaintiffs had been engaged in selling them to the trade for many years. It was also shown that boiler flues were manufactured in standard sizes only, such sizes being fixed in inches and fractions thereof, outside measurement. No flues are made between 13-inch and 2-inch outside diameter, and knowledge of this fact, which stands undisputed, must be attributed to plaintiffs; so that a ferrule 1-18 of an inch gauge, with an outside diameter of 2 inches, could not be used upon a 13-inch or a 2-inch flue, being too large for the one, and too small for the other. The same objections were made to the 23-inch and 3-inch ferrules furnished by plaintiffs, the fact being that no boiler flues were manufactured on which any of these ferrules would fit.

With this condition of affairs, of long standing when defendants gave their order for boiler-flue ferrules,—an article of common use, -evidence of custom and usage, so called, and the understanding of those engaged in this particular line of trade, was admissible to show what was intended, and what should have been understood, by It is a rule of interpretation that the intention of the plaintiffs. parties to a contract is to be ascertained by applying its terms to the subject-matter. The subject or object to which it is to be applied may be ascertained by extrinsic evidence, if it can be done without a departure from the rational meaning of the words actually used. If the meaning is involved in uncertainty, the intention may be ascertained by such testimony, and, when so ascertained, will be taken as the meaning of the parties, if such meaning can be distinctly derived from a fair and rational interpretation of the language employed. It was well said in Paine v. Smith, 33 Minn. 495, (24 N. W. Rep. 305,) that in a commercial community many words or phrases acquire a technical meaning, well understood by those in a particular trade or business. Certain business customs and usages also become well established and understood by business men, who, in making their contracts, assume them for granted, and contract with reference to them, without taking time to incorporate them into the express terms of their bargains. On this branch of the case the court should have submitted it to the jury.

Under the pleadings and the testimony, the defendants were not entitled to recover upon their counterclaim for damages. As late as August 21, 1890, defendants urged shipment of the goods, and, on August 29th, expressed their satisfaction at being advised of the forwarding of a part on that day, asking that the balance be sent quickly. They could not consistently urge shipment of the goods, and retain their right to demand damages for the previously existing delay in filling their order. See Fowlds v. Evans, 52 Minn. 551, (54 N. W. Rep. 743.)

Order affirmed.

VANDERBURGH, J., absent, took no part.

(Opinion published 55 N. W. Rep. 131.)

Application for reargument denied June 1. 1893.

OLIVE LANCOURE vs. PETER DUPRE.

53 **301** 63 **458**

Argued by appellant, submitted on brief by respondent, April 12, 1893. Decided May 19, 1893.

Measure of Damages on Vendor's Failure to Convey.

In an action by a vendee for a breach of contract to sell real property because of the inability of the vendor to convey good title, the former is entitled to recover of the vendor interest upon all moneys paid on the contract from the date of payment, whether the same was paid as principal or as interest; and is also entitled to recover such sums as he may have paid as taxes upon the premises, with interest from the dates of payment.

Same-Improvements by Vendee.

The general rule in such cases is that the vendee may also recover the value of improvements put on the land by him in good faith, in so far as such improvements may, at the time of the rescission of the contract, permanently enhance the value of the land.

Rental Value to be Offset.

As against these items of damage the vendor is entitled to offset the rental value of the premises, to be estimated without the improvements placed thereon by the vendee.

Appeal by plaintiff, Olive Lancoure, from a judgment of the District Court of Ramsey County, Charles E. Otis, J., entered January 11, 1893.

On February 14, 1877, the defendant, Peter Dupre, made a contract with plaintiff whereby he agreed to sell and convey to her, by warranty deed, six acres in the southeast quarter of the northwest quarter of section twenty-three (23), T. 31, R. 22, in Anoka County, being the premises conveyed by Peter Porter and wife to Joseph Nadeau, June 8, 1874, and by Nadeau to defendant April 4, 1876. Plaintiff took possession of the property, paid him \$300, and gave him her note for \$300 more, payable on or before November 4, 1886, with interest annually. The deed was to be made when she paid the note. She paid the interest, \$21 a year, to November 4, 1881, and the taxes on the property until 1885. Defendant represented that he had a good title, and that Nadeau's wife had executed the

deed with her husband. But she had not, and has always refused, and defendant knew it. In the Fall of 1882, plaintiff tendered payment of her note and demanded a deed, and informed defendant that she desired to build a house on the property. He told her to go on and build the house, and he would reimburse her for any loss in so doing, in case a good title to the land was not procured and conveyed to her. In reliance thereon, plaintiff built the house at an expense of \$800. She has since frequently tendered payment of her note, and demanded a conveyance, but defendant has never been able to induce Nadeau's wife to join with her husband in a deed of the property. In March, 1886, plaintiff rescinded the contract, abandoned the property, and in September, 1886, brought this action to recover the purchase money, interest and taxes paid, and interest on each payment and the value of the house and interest thereon, less the value of the use of the land while she occupied it. The place of trial was afterwards changed by consent from Anoka to Ramsey County.

On the trial before the court without a jury, in December, 1889, plaintiff was allowed for principal, taxes and interest paid, and was also allowed interest on the \$300 paid, but on nothing else. She was not allowed anything for the house. She was charged \$50 a year for nine years' use of the land. Findings were made and judgment entered that she recover the balance, \$177.19, with interest from March 1, 1886; and that her note for \$300 be surrendered on depositing in court her quitclaim deed to defendant of the property. In a memorandum filed with the findings, the trial court said:

"Conceding the plaintiff could rescind the contract and recover damages, it seems to me the measure thereof must be the fair value of the improvements at time of rescission. Until then she sustained no loss from defendant's failure to procure and pass to her a valid title, and when she abandoned the premises, her loss was just what the improvements would have been fairly worth to her or to anyone retaining possession of the property, that is, what they were then worth to the property. But plaintiff has made her complaint and tried her case upon an entirely different theory, and there is nothing in the pleadings or proofs from which the court can determine such value. The fact that they cost a certain sum four

years before, would not warrant such finding, especially in view of the fact that neither party considered such issue in the case."

Warner, Richardson & Lawrence, for appellant.

Effectual exercise of the right to rescind creates a right to restitution and the defendant became obliged to refund to plaintiff all the monies with interest thereon which she had paid to him, and all the monies with interest thereon which she had expended for taxes or for improvements. It was not essential to defendant's obligation to restore the monies so expended for taxes and repairs that he had realized or ever would realize any actual benefit or advantage from the expenditure, because in such a case the vendor may not own the land. We cannot account for the decision below with respect to the cost of the repairs, except by supposing that for the time being, the court below mistook this for an action based on the contract to recover compensation for the loss of plaintiff's bargain.

Before plaintiff began her improvements, she concluded to complete payment of the purchase money and obtain the conveyance. In attempting to do this, she found that defendant was not able to perform. What was to be done? The defendant practically said to her, "I can and I will get power to carry out my contract. go right ahead and make these proposed repairs. I am good for it." Good for what? These words were not technical. were to be interpreted by the light of the circumstances attending their use. Crone v. Braun, 23 Minn. 239. Both parties knew what these circumstances were. The plain import of defendant's language was that the plaintiff was to cause these repairs to be made and that she was to pay for them, and that all this was to be done on defendant's personal credit and at his sole risk, precisely as if plaintiff was his mere agent, employed to attend to the making of certain proposed improvements upon his land. Edwards v. McLeay, 2 Swans. 287; Gibson v. D'Este, 2 Y. & C. 542; Farris v. Ware, 60 Me. 482; King's Heirs v. Thompson, 9 Pet. 204; Driggs v. Dwight, 17 Wend. 71; Kelley v. West, 36 Minn. 520; Patrick v. Roach, 21 Tex. 251; Thouvenin v. Lea, 26 Tex. 612; Gibert v. Peteler, 38 N. Y. 165; McClure v. Lewis, 72 Mo. 314; Harris v. Harris, 70 Pa. St. 170; Leffingwell v. Elliott, 10 Pick. 204; Johnson v. Meyers' Ex'r, 34 Mo. 255; Palmer v. March, 34 Minn. 127; Bennett v. Phelps, 12 Minn. 326; Murphin v. Scovell, 41 Minn. 262; 44 Minn. 530.

The cost of the building was prima facie evidence of its value. Norton v. Willis, 73 Me. 580; Angell v. Hopkins, 79 Cal. 181; Seigneuret v. Fahey, 27 Minn. 60; Pittsburgh, C. & St. L. Ry. Co. v. Hixon, 110 Ind. 225; Jones v. Morgan, 90 N. Y. 4; McKenzie v. Bacon, 41 La. An. 6.

The court erred in allowing the defendant full rent for use of the premises, while throwing out plaintiff's entire claim on account of the improvements. The theory of the decision was such as to cast on plaintiff all the loss from usual wear and tear and effect of the elements, and at the same time made her pay the defendant therefor. Because full rent presumably includes payment for such wear, tear, and depreciation.

It seems that the court, upon consideration, came to the conclusion that the value of the improvements at the time of rescission was the measure of defendant's liability on that account; and then, finding nothing in the pleadings or evidence bearing on such value, except said cost, concluded to allow full rent to defendant, and nothing on that account to the plaintiff. It is submitted that it was the duty of the court below, under such circumstances, to have declared the rights of the parties, and to have directed a reference under the judgment. Such always has been the course in such cases, and the Code provides for it. 1878 G. S. ch. 66, § 247, subd. 2; Madison Ave. Bap. Church v. Olive St. Bap. Church, 73 N. Y. 82; Barnett v. Higgins, 4 Dana, 565; Worrall v. Munn, 38 N. Y. 137; Ashton v. Thompson, 28 Minn. 830.

C. D. & Thos. D. O'Brien, for respondent.

Although the complaint is voluminous and contains numerous unnecessary statements and allegations, the action after all was merely an action for money upon an alleged breach of contract. This contract was the bond executed by the defendant, and it controls the rights of the parties, and limits their remedies. The liability of the defendant is limited, first, to the amount of the bond, and, second, to the damages sustained by the plaintiff upon a breach

of its condition; and the plaintiff's claim cannot be expanded by any averments in the complaint beyond the situation fixed by the parties in their written contract. There was no necessity for a rescission of the contract upon her part. The bond was the bond of the defendant. A failure to comply with its terms and conditions upon his part constituted a breach, upon which occurrence the plaintiff had a right of action upon the bond for her damages, and nothing else. The bond cannot be excluded from consideration in this case, for without it, she had no cause of action.

Plaintiff's entire payments, including taxes and interest upon such payments, aggregated \$627.19, while the rental value of the land is found by the court during such period to have been \$450, leaving an overpayment by her of only \$177.19, for which, with interest, she had judgment.

COLLINS, J. The defendant, in the year 1877, sold to plaintiff the tract of land described in the complaint, and executed and delivered to her his bond for a deed. One half of the agreed purchase price was paid by plaintiff about the time of the purchase. Plaintiff went into possession, and remained until March 1, 1886, when she elected to rescind the contract, abandoned the premises, and brought this action to recover damages because of the failureand inability of defendant to convey a good title in accordance with the conditions of his bond. In this instrument it was stated that the premises to be conveyed were the same deeded by one Porter and his wife to Joseph Nadeau in the year 1874, and by said Nadeau and his wife to defendant, April 4, 1876. At the date of conveyance to defendant, Nadeau was a married man, as defendant well knew, but his wife at that time refused, and she has ever since refused, to join in the deed, or to consent in writing to the same. reason of this refusal, defendant's title to the premises was and has remained defective, subject to the inchoate interest and estate of Nadeau's wife known as the "dower right." In 1882, the plaintiff, desiring to make substantial improvements on the land, offered to pay the balance of the purchase price to defendant, providing he would convey a good title to her, but, discovering the defect before mentioned, she refused to accept his deed solely because of such defect. Thereupon the defendant assured her that he could v.53 m. -20

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and would secure a further and sufficient conveyance from Nadeau and his wife, so as to perfect his own title, and would convey the same to plaintiff, and that she could safely make the proposed improvements. At this time the balance of the purchase price was not due, although plaintiff, at her option, could pay it. upon the statement in the bond as to the source of title, and representations that the defendant was able to convey a good title to the land, the plaintiff was induced to purchase; and, relying upon his further statements and representations that he could and would perfect his defective title, as well as upon the original statements and representations, the plaintiff placed betterments upon the land in 1882 at a cost of \$800, as was found by the court. She had also, while in possession, paid the annual interest on account of the deferred purchase-price payment, and had also paid the taxes as they fell due for several years.

The defendant was unable and has refused to perfect his title by deed or otherwise, and in March, 1886, as before stated, plaintiff took such steps as were essential to rescind the contract to purchase, and brought this action. This appeal is by plaintiff from a judgment entered in conformity with the findings of fact and conclusions of law of the trial court.

When ordering judgment for plaintiff, the court below recognized her right to recover the amount paid as part of the purchase price. with interest from the date of payment, and to recover the amounts she had paid as interest upon the deferred payment, and to recover the amounts paid for taxes. As against those sums it offset the rental value of the premises while plaintiff held possession. interest was allowed her upon the amounts paid as interest on the deferred purchase-price payment, nor upon the sums annually paid as taxes, nor was interest allowed to defendant upon the amounts determined to be due to him as annual rental. Nor was anything awarded to plaintiff as compensation for the improvements placed upon the premises in 1882. The refusal of the court to allow for improvements was based on the fact that plaintiff made no effort to prove the value or worth of the same to the land at the time of the rescission. Their cost four years earlier had been established. but there was nothing in the pleadings or proof from which their worth to the land, when plaintiff elected to rescind and abandoned the premises, or, rather, in what amount these improvements had enhanced the value of the land, could be determined. The correctness of this view of the law is the principal question before us, the other questions being in reference to the right of plaintiff to recover interest upon the amounts paid as interest and for taxes, and whether defendant should be allowed interest upon the annual rental value of the land.

Where there is a rescission of a land contract because the seller is unable or refuses to convey a good title, the purchaser should certainly be put in statu quo, as nearly as possible. Literal restoration seems impossible when the contract has been acted upon, payments made, possession enjoyed, and permanent improvements placed on the premises. When the damages are capable of measurement, the doctrine requiring that there be awarded to the injured party compensation equivalent to the actual damages he has sustained is not, in a case like this, at all in-Indeed, it is obvious that in no other manner could justice be done to the plaintiff; and it was said in Erickson v. Bennet, 39 Minn. 326, (40 N. W. Rep. 157,) that, generally, where one contracts to convey real estate, knowing that he has no title, and cannot perform his contract, the recovery is not limited by the technical rule of damages usually applicable in actions upon the covenants in a deed of conveyance, but that it is measured by the broader rule of compensation generally applied in cases of breach The statements and representations as of contract and of fraud. to title and source of title, and his ability to convey, before mentioned, were relied upon by plaintiff, and induced her to purchase. and in good faith to make permanent improvements. false, and defendant knew, or should have known, of their falsity. The defendant can-They amounted to a fraud upon the plaintiff. not complain if he be required to compensate her and make good the loss. But the amount which plaintiff lost because deprived of her improvements was not what they cost in 1882, but was what they were worth to the land when she was compelled to remove from the same; that is, the amount the land was permanently enhanced in value thereby. To illustrate: The value of the dwelling house rebuilt by the plaintiff could not be increased or decreased in value by defendant's course. Had he complied with his contract, the

house would have been worth no more and no less than it was when he refused to perform. In either event its present value would have been the same. Had the plaintiff lost it by the elements on the day she gave it up her loss would have been its value, not what it cost. That she was deprived of it through defendant's fault, and not by the elements, cannot augment the amount of her loss, nor increase the compensation she should receive therefor. If, then, the true measure of damages in such cases be compensation, the trial court did not err when refusing to allow to plaintiff the cost of her betterments.

The generally accepted and proper rule, in our opinion, where there is a rescission of a contract for the sale of land for want of a perfect title, is that improvements put on the land in good faith by the purchaser must be accounted for, in so far as they may at the time of the rescission permanently enhance the value of the land. Winters v. Elliott, 1 Lea, 676; Mason v. Lawing, 10 Lea, 264. See, also, Davis v. Strobridge, 44 Mich. 157, (6 N. W. Rep. 205;) Sheard v. Welburn, 67 Mich. 387, (34 N. W. Rep. 716;) Harris v. Harris, 70 Pa. St. 170.

But counsel for appellant argue that the theory of the rule is such as to cast upon the plaintiff all of the loss from the effect of the elements upon the improvements, and at the same time she is adjudged liable to defendant for the rental value therefor, because full rent presumably includes payment for depreciation in value through ordinary wear and tear. If there is anything in the record to justify the claim that, when determining the rental value of the premises allowed defendant, the court below included the rental value of plaintiff's improvements, there would be force in the argument, but there is not. The court should have fixed the rental value of the land alone,—the property the defendant sold, agreed to convey, but did not. The law requires the purchaser to account to the seller for the rental value of the premises sold, and of which the former has had possession. We cannot assume that the trial court improperly assessed the rental value under a misconception of the law, for there is nothing in the record to indicate it, and the presumption is the other way. Again, the rental value per annum was fixed by the court at the same for each of the five years preceding the making of the improvements as it was for

each of the years subsequent thereto, and this tends to demonstrate that the value of the use of the improvements was not included.

The plaintiff was entitled to recover interest upon the sums paid as interest upon the deferred payment, and also upon the amounts paid for taxes. This must follow from the fact that she can recover the amount of the payments; and as against these various sums the defendant can offset and recover the annual rentals with interest from the end of each year of plaintiff's possession.

There could be no serious obstacle in the way of a modification of the judgment so as to allow to the respective parties interest as above indicated, but, in our opinion, justice requires that the case be remanded for a new trial. It is so ordered.

Judgment reversed.

VANDERBURGH, J., took no part. (Opinion published 55 N. W. Rep. 129.)

JASON C. EASTON vs. T. A. SORENSON, County Auditor.

Argued May 4, 1893. Decided May 19, 1893.

Limitation of Action for Money Paid at a Void Tax Sale.

As against a claim upon a county to have returned the amount of money paid out for lands at a void tax sale, as provided in 1878 G. S. ch. 11, § 97, as amended by Laws 1881, ch. 10, the statute of limitations commences to run on the day of the entry of judgment against the purchaser adjudging and decreeing such sale void.

Appeal by defendant, T. A. Sorenson, County Auditor of Fillmore County, from an order of the District Court of that County, John Q. Farmer, J., made August 17, 1892, overruling his demurrer to the complaint.

The complaint was framed under 1878 G. S. ch. 11, § 97, as amended by Laws 1881, ch. 10, § 19, and by Laws 1889, ch. 186, § 1, to recover money paid at tax sales prior to 1870. The action was commenced July 15, 1890, but the demurrer was not argued in the trial court until August 17, 1892. This was more than a year after

Laws 1891, ch. 66, had again amended the last proviso of the section so that it read, "that the provisions of this section shall not apply to any sales of land for taxes made prior to the passage of this Act."

The complaint was substantially as follows: The defendant is County Auditor of Fillmore County. At a sale of land for taxes held at the Auditor's office on June 7, 1869, the south half of southwest quarter of section four (4), T. 104, R. 8, in said county, was exposed for sale for nonpayment of taxes levied and assessed thereon for the year 1868, with interest, penalties and costs; and on that day the plaintiff, Jason C. Easton, purchased said land at said sale for \$9.87, which sum plaintiff, as such purchaser, on said day paid therefor into the treasury of said county. Thereupon the Auditor of said county issued and delivered to him an official certificate of the purchase. Thereafter on August 11, 1871, the land being unredeemed from the sale, and the time of redemption having expired, plaintiff surrendered his certificate, and received from said Auditor an official deed of said land, and it was recorded November 30, 1876, in the Registry of Deeds of said county. In an action pending in the District Court of said County, wherein John Kohan was plaintiff and the plaintiff Easton was defendant, judgment was duly given and entered November 24, 1880, that the estate and interest which Easton claimed in and to said land under and by virtue of said tax sale, certificate and deed, were void, and said tax deed and certificate were set aside and cancelled of record. Thereafter on June 30, 1890, this plaintiff Easton presented to said Auditor a copy of that judgment, and demanded that he make and deliver to plaintiff his official warrant on the County Treasurer of said county in favor of this plaintiff, for the money so paid, with interest thereon at the rate of seven per cent. a year from June 7, 1869; but defendant refused and still refuses so to do, and this plaintiff has never been repaid said money or interest or any of it. fore plaintiff prays judgment that defendant forthwith draw and deliver to plaintiff his official warrant upon the Treasurer of Fillmore County for said money and interest, and that plaintiff recover his costs and disbursements, and have such other and further relief as shall seem to the court equitable. There were other counts for the taxes of other years.

To this complaint the defendant demurred on the ground that it stated no cause of action against him, in that it showed that the cause of action accrued more than six years before the suit was commenced. The demurrer was overruled, and defendant appealed.

The Attorney General and G. W. Rockwell, County Attorney, for appellant.

This action is based on 1878 G. S. ch. 11, § 97, as amended by Laws 1881, ch. 10. The last proviso to the section as amended was as follows: "Provided, further, that the provisions of this section shall apply to all sales of land for taxes made prior to the passage of this Act." This gave the plaintiff the right to maintain this action. But this proviso was so amended by Laws 1891, ch. 66, that the remedy provided should not apply to tax sales that took place before the passage of the law. The statute creating this liability does not change the statute of limitations, and 1878 G. S. ch. 66, §§ 3, 6, are still in force. McClung v. Capchart, 24 Minn. 17; P. P. Mast & Co. v. Euston, 33 Minn. 161.

There is no provision in § 97, for a demand as a condition precedent to bringing an action, or as to the manner in which the demand shall be made. In *Corbin* v. *Morrow*, 46 Minn. 522, it was held that, as the action must be based on the breach by the Auditor of a duty to the plaintiff, the complaint must, of course, show that it was the Auditor's duty to issue the warrant to him. It could not be his duty, and he would have no right to issue it, without a demand.

This action was not commenced within the time limited by the statute of limitations. Branch v. Dawson, 33 Minn. 399, is not authority in this case, for the reason that the necessity of making the demand is a condition precedent to maintaining the action by a depositor against a bank, and until such demand, no cause of action arises on account of the contractual relation existing between a bank and a depositor of funds. In the case at bar the liability is created by statute, and the statute of limitations commenced to run upon the entry of the judgment declaring the tax sale to be void. Litchfield v. McDonald, 35 Minn. 167; Pittsburgh & C. R.

Co. v. Byers, 32 Pa. St. 22; Codman v. Rogers, 10 Pick. 112; Morrison's Adm'r v. Mullin, 34 Pa. St. 12; Hintrager v. Traut, 69 Iowa, 746; Atchison, T. & S. F. R. Co. v. Burlingame Tp., 36 Kan. 628; High v. Board of Com'rs, Shelby Co., 92 Ind. 587.

The law upon which the plaintiff predicates his cause of action was passed after the tax sales were made to him, which were declared void by the judgment of the District Court of Fillmore County, and by Laws 1891, ch. 66, it was expressly enacted that the remedy provided for by 1878 G. S. ch. 11, § 97, as amended by Laws 1881, ch. 10, should not apply to sales made prior to 1878. Consequently no right of action exists, because none is provided for by the statute.

Kingsley & Shepherd, for respondent.

The question whether or not the cause of action alleged in the complaint is barred by the statute of limitations, depends upon the other question, when did the cause of action accrue? Under 1878 G. S. ch. 11, § 97, before Easton was entitled to the refundment therein provided for, it was necessary for him to make a demand upon the County Auditor, and to furnish him with proof of plaintiff's right to a return of the money paid by him. The County Auditor had no right to issue his warrant upon a mere demand, unaccompanied by such proof.

The cause of action set up in the complaint, therefore, did not accrue until June 30, 1890, and is not barred. The appellant, recognizing the force of this, seeks to avoid it by saying that the demand should have been made within six years from the time of docketing the judgment, and claims that because the demand was not made within the six years, therefore, the claim is barred, and cites several cases in support of the proposition. The doctrine of those cases, as applied to a case like the present, has been repudiated in this court. Branch v. Dawson, 33 Minn. 399.

When a deposit is made in a bank the understanding is, and it is a part of the contract between the banker and the depositor, that a demand of the depositor in some form upon his banker for the money, is essential to the right of the depositor to bring an action to recover the money. So with the purchaser at a tax sale.

The duty is imposed upon him by law, and enters into and forms a part of the contract, to present his claim to the County Auditor and make proof of his right to a refundment, before he is entitled to the Auditor's warrant therefor.

COLLINS, J. Appeal from an order overruling a general demur-The main question is whether plaintiff is rer to the complaint. entitled, under 1878 G. S. ch. 11, § 97, as amended by Laws 1881, ch. 10, to have returned to him out of the county treasury the amounts paid for certain lands at tax sales held in the years 1866, 1867, and 1868. Tax certificates were duly issued at such sales, upon which plaintiff obtained tax deeds on and prior to August 11, 1871. judgment adjudging and decreeing these tax sales, the certificates, and the deeds null and void was duly entered November 24, 1880. Plaintiff made no demand upon the county auditor for a warrant on the county treasurer, according to the complaint, until June 30, 1890, -nearly ten years after the judgment had been declared void and set aside; therefore much more than six years had elapsed between the day on which judgment was entered against the plaintiff and the day on which demand was made on the county auditor for a warrant on the treasurer, and it is the position of counsel for defendant auditor that the cause of action was barred by the statute of limitations. 1878 G. S. ch. 66, §§ 3, 6. This depends upon when the cause of action accrued. If at the time of the entry of judgment, in 1880, the position before referred to is unassailable, and the order appealed from must be reversed. Upon the other hand, if the cause of action did not accrue until a demand was made. the statute was not set in motion until then, and the complaint stated a good cause of action. In Corbin v. Morrow, 46 Minn. 522, (49 N. W. Rep. 201,) it was held that, in order to bring himself within the provisions of the statute first above cited, it is incumbent upon one claiming a right to have the amount he had paid out returned to him out of the county treasury to show by his complaint that he has made such demand, accompanied by proper evidence of his right to make it. As the action, said the court, must be based on a breach of duty by the auditor, the complaint must show affirmatively that it was the auditor's duty to issue the warrant. Respondent's counsel rely upon this case, arguing that the language used justifies the assertion that no cause of action accrues until demand is made.

In Brown v. Brown, 28 Minn. 501, (11 N. W. Rep. 64,) this court . held that where a loan of money was made upon the condition that the debt therefor should become due and payable when demand was made, and not before, the statute of limitations began to run from the date of the demand, and not from the date of the loan. In Branch v. Dawson, 33 Minn. 399, (23 N. W. Rep. 552,) the rule was established that the right to sue a bank upon a general deposit does not accrue, nor does the statute of limitations upon it begin to run, until a demand of payment, unless such demand is in some way dispensed with. In each of these cases care was taken to place the conclusion upon the ground that it was the intention of the parties to a contract to make a request for payment a condition precedent to the liability to pay the money, and therefore, as no action would lie until the condition was performed, the statute of limitations commenced to run when demand was made, and not Neither of these cases is authority in respondent's behalf, for there is no resemblance between a purchaser at a tax sale and a bank depositor. The liability of a banker to his depositor grows out of contract, while in the case of a purchaser at a tax sale, where the sale has been adjudged void, the duty of the auditor to issue a warrant and the liability of the county to refund arise by virtue of the statute. The relations between the parties are not at all similar, being contractual in the one case and statutory in the other.

In Litchfield v. McDonald, 35 Minn. 167, (28 N. W. Rep. 191,) it was held that the leave to be obtained (1878 G. S. ch. 78, §§ 1-3) from a district court or judge, before bringing action upon an official bond, was no part of an aggrieved person's cause of action, and hence that the time of obtaining such leave cut no figure in the application of a statute of limitations; the statute commenced to run from the time the wrong complained of was perpetrated, and not from the time leave to sue was obtained. The cause of action, if there was one, accrued independently of and prior to the application for leave, and was the very basis on which the application rested. So it was with the demand in controversy here, and the language used in the Litchfield Case when considering the claim that the

statute of limitations commenced to run when leave to sue the bond was obtained, and not before, changing it to fit the present facts, is exactly in point. It need not be repeated. The plaintiff's right to have his money returned was complete when the judgment was entered against him, and whether he received it promptly was a matter entirely within his control. His cause of action then accrued, although his right to maintain a suit upon this cause depended upon his taking certain preliminary steps, clearly requisite for the information of the officers and the protection of the county. It would be absurd to say that one entitled to receive money out of the county treasury, upon making proof of his right, can indefinitely prolong the time within which suit may be brought by voluntarily omitting to make his proof. This proof is no part of the cause of action, but simply evidence that a cause of action exists. following cases may be cited as analogous to the one at bar: Hintrager v. Traut, 69 Iowa, 746, (27 N. W. Rep. 807;) Atchison, etc., Ry. Co. v. Burlingame Tp., 36 Kan. 633, (14 Pac. Rep. 271;) High v. Commissioners, 92 Ind. 587; Codman v. Rogers, 10 Pick. 112.

The statute of limitations commenced to run against plaintiff's claim upon the county on the day judgment was entered against him.

Order reversed.

VANDERBURGH, J., absent. did not sit. (Opinion published 55 N. W. Rep. 128.)

MARY B. LEE vs. MATT CLARK.

Argued by appellant, submitted on brief by respondent, May 3, 1893. Decided May 19, 1893.

Subscription of Attorney's Name to Copy of Summons Served.

The original summons in an action was duly subscribed by plaintiff's attorneys, and their place of business was stated with unnecessary particularity. It was also indorsed upon the back in the same way. Attached to the summons was the complaint, duly signed by plaintiff's attorneys. Copies of the summons and of the complaint were served together upon defendant, accurate and complete in every respect, except that

the firm name of the plaintiff's attorneys was omitted when transcribing the subscription to the summons. *Held* a mere irregularity, and that, if defendant desired to take advantage of it, he should have done so by a motion to set aside the service.

Appeal by defendant, Matt Clark, from an order of the District Court of Hennepin County, *Thomas Canty*, J., made August 25, 1892, denying his motion to set aside and vacate the judgment entered against him November 28, 1890, for \$4,989.71 in favor of plaintiff, Mary B. Lee.

Between April 1, 1883, and September 1, 1884, the plaintiff, Mary B. Lee, employed defendant to sell on commission, a large quantity of saw logs, of the value of \$7,404.82 over and above his commissions; all of which logs he sold within that time under such employment, and received the price. He accounted for and paid over to plaintiff \$3,937.70, but no more. She brought this action July 26, 1890, to recover the balance with interest. The copy of the summons served was not subscribed with the name of the plaintiff's attorneys. Their firm name was indorsed on the back of the summons, and was signed to the copy of the complaint attached to, and served with, the summons. No notice of appearance or answer was served, and on November 28, 1890, judgment was entered. On August 6, 1892, defendant moved the court to vacate the judgment. The motion was denied, and he appeals.

Ewing & Ewing, for appellant, cited Ames v. Schurmeier, 9 Minn. 221, (Gil. 206;) Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408;) Herrick v. Morrill, 37 Minn. 250.

Penney, Jamison & Hayne, for respondent, cited Nye v. Swan, 42 Minn. 243; Herrick v. Butler, 30 Minn. 156; Mabbett v. Vick, 53 Wis. 158; Low v. Mills, 61 Mich. 35; Creveling v. Moore, 39 Mich. 563; Gould v. Castel, 47 Mich. 604; Gerrish v. Hunt, 66 Iowa, 682; Heinrich v. Englund, 34 Minn. 395.

COLLINS, J. The summons in this action, which was brought for the recovery of money, was in strict compliance with the requirements of 1878 G. S. ch. 66, §§ 53, 54, being subscribed thus: "Penney & Rogers, Attorneys for Plaintiff, No. 43 Washington Avenue

South, Rooms 7, 8, and 9, Minneapolis, Minn." The same words and figures appeared as an indorsement upon the back of the summons. The original complaint, properly subscribed by plaintiff's attorneys, was attached to the summons. From the affidavit of service it appears that a private person made the same July 26, 1890, by handing to and leaving with the defendant's wife, at the house of his usual abode, (said wife being then a resident of the house, and a person of suitable age and discretion,) true and correct copies of November 28, 1890, judgment was the summons and complaint. entered against defendant for want of answer upon filing the original summons and complaint, with due proof of service, made on defendant as before stated, and an affidavit of no answer. 1892, defendant moved to set aside and vacate the judgment, on the ground of an irregularity or defect in the mode of service of the summons, which he claimed went to the jurisdiction of the court to enter the same; and on the hearing it was conclusively shown that the firm name of plaintiff's attorneys, "Penney & Rogers," as this firm name appeared, in connection with the firm's place of business as before indicated, in the subscription to the original summons, had been omitted from the copy left with Mrs. Clark. other respect—the street, the number thereof, the numbers of the rooms, and the city in which the attorneys had their office, including the full indorsement on the back—the copy served was accurate The defendant's counsel urge this defect and omisand complete. sion as fatal to the service, and as rendering the judgment absolutely void.

The original summons and attached complaint were regular in every way, and the affidavit of the person serving the same showed due service of both upon the defendant. The court, prima facie, had acquired jurisdiction of defendant's person, and upon the filing of these papers and proofs, with an affidavit of no answer, was fully authorized to enter the judgment. From the copies of the summons and complaint actually served it clearly appeared who plaintiff's attorneys were, as well as the location of their office, the latter with unnecessary particularity. The defect in the copy of the summons was not substantial, nor of a character calculated to mislead, nor is there any intimation that defendant was misled thereby. The omission to transcribe the names of plaintiff's attorneys when

copying the summons for service was of no more consequence than was the error in the original summons and copy, as served, which was the subject of consideration in *Millette* v. *Mehmke*, 26 Minn. 306, (3 N. W. Rep. 700.)

At most the omission was but a mere irregularity, and, if defendant desired to take advantage of the same, he should have done so by a motion to set aside the service. See *Creveling v. Moore*, 39 Mich. 563; *Low v. Mills*, 61 Mich. 35, (27 N. W. Rep. 877;) *Mabbett v. Vick*, 53 Wis. 158, (10 N. W. Rep. 84.)

When there has been a departure from the requirements of the statute in regard to the service of a summons in any substantial matter affecting the rights of a defendant, jurisdiction of his person will not be acquired, and a judgment entered on such service will be set aside and vacated on proper application. But no such case is now before us.

Order affirmed.

Vanderburgh, J., absent, took no part. (Opinion published 55 N. W. Rep. 127.)

53 318 58 460 STATE ex rel. John A. STEES et al. vs. Charles E. Otis, Judge.

Argued April 25, 1898. Decided May 22, 1893.

St. Paul City Charter Construed and Held Valid.

The charter of the city of St. Paul, as amended in 1891, imposes upon the city the duty of paying the compensation assessed for the taking of property for public use; hence the law authorizing such taking of property is not unconstitutional.

Local Improvements—District Benefited how Determined.

A notice of the meeting of the board of public works for the purpose of assessing upon the property benefited the cost of a public improvement is invalid if, in advance of any hearing, it defines a limited district as embracing the property upon which the assessment is to be made.

On November 30, 1892, John A. Stees and forty other persons owning real estate on Seventh street, St. Paul, presented in this court their verified petition, and obtained a writ of *Certiorari* to the District Court of Ramsey County, returnable on the first day of the

April term, 1893, and requiring that court to certify and return to this court all the proceedings had in that court touching the application of the City Treasurer for judgment against their property for assessments of the costs and expenses of widening East Seventh street between Broadway and Rosabel streets.

Hon. Charles E. Otis, one of the Judges of the District Court, made return January 9, 1893, to this court of the entire record of the proceedings had and taken in the District Court. therefrom that the Common Council on November 3, 1891, referred the matter of widening the street to the Board of Public Works, and that Board reported December 22, 1891, in favor of the proposed widening, and estimated the expense at \$13,500, and submitted a plan thereof. On January 5, 1892, the Council ordered the Board of Public Works to make the improvement, and without delay to assess the expense upon the real estate to be benefited. The Board on January 22, 1892, gave notice that they would meet at their office on February 8, 1892, to make an assessment of benefits, costs and expenses arising from the widening of the street from Broadway to Rosabel streets on the property on the line of Seventh street from Jackson street to Kittson street, and deemed benefited or damaged thereby. All persons interested were thereby notified to be present at said meeting, and they would be heard. Pursuant to this notice the Board met and made and filed an assessment of benefits and damages within the limits designated in the notice. assessment was afterwards confirmed, and a warrant issued for its collection, but the assessments upon the real estate of these petitioners were not paid. The City Treasurer thereupon gave notice, and applied to the District Court for judgment against each piece of said real estate for the amount assessed against it. tioners filed their objections and served copies on the Corporation Attorney, and at the hearing made their proofs before the court, but judgment was granted and entered November 16, 1892, against their property. They then obtained the writ of this court to review the proceedings.

S. L. Pierce, for relators.

The order of the City Council was, that the Board of Public Works should assess the amount required to pay the damages of widening Seventh street upon the real estate to be benefited by the improvement. But the notice on its face limits the territory to be assessed to property on the line of Seventh street from Jackson street to Kittson street. Not only is this notice jurisdictional, but unless it is given at the time and in the manner required, the Board has no right to proceed, and the proceedings are unauthorized and void. 2 Dillon, Mun. Corp. (3d Ed.) § 606; McComb v. Bell, 2 Minn. 295, (Gil. 256;) Sewall v. City of St. Paul, 20 Minn. 511, (Gil. 459;) Ocermann v. City of St. Paul, 39 Minn. 120.

One of the first duties of the Board in making the assessment is to ascertain what property is to be benefited. If this is done before notice is given, it is in violation of the rights of the owners of the land assessed to have previous notice. It is an ex parte adjudication of a material right of the owners of the property found to be benefited, for on being heard, they might have been able to convince an impartial tribunal that other lands were specially benefited, and the greater the quantity of land so benefited, the lower the assessment on each parcel. But in this case the notice shows on its face that the assessment was arbitrarily limited to property fronting on the street that is widened, while the order was, that it should be on all property specially benefited.

Leon T. Chamberlain and Hermon W. Phillips, for respondent.

This notice has been held good by this court. Fairchild v. City of St. Paul, 46 Minn. 540.

This notice contains everything required by the Charter of the City. The objection made by the relators is, that the notice contains more than the Charter requires. If it does, this extra statement is surplusage, and would not prevent the notice from being received by the proper parties, the notice being given solely by publication; and the most important thing is, that the notice should be received by the proper parties. Johnson v. City of St. Paul, 52 Minn. 364.

DICKINSON, J. By a writ of certiorari, the proceedings, under the charter of the city of St. Paul, for the widening of East Seventh street, and involving a condemnation of land for that purpose, have been brought here for review. Two questions are presented:

First. Under the city charter, in its present form, is there such provision for the payment of the damages which may be assessed in favor of the landowner for the taking of his land that such compensation is "secured" to him, as required by the constitution? Second. Was the notice of the meeting of the board of public works for the assessment of damages and benefits insufficient for the reason that it specified the limits of the district to be assessed?

1. The argument of the relators upon the first of these points is, in brief, that while by the provisions of the charter the confirmation of the assessment of damages completes the condemnation, so that the city may then take possession, no absolute duty of paying the damages assessed rests upon the city, and that such compensation can only be made from the fund derived from collections of special assessments. We cannot admit the correctness of this premise upon which it is claimed that the city is without power to constitutionally condemn private property for public use. hold, on the contrary, that upon the completion of the condemnation proceedings it becomes the absolute duty of the city to pay, within six months thereafter, the damages awarded, with interest at the rate of seven per cent. per annum. In so holding we only restate what is unequivocally expressed in the last of the legislative enactments to which we are cited,-Sp. Laws 1891, ch. 12, §§ 2, 3, amending Sp. Laws 1887, ch. 7, subch. 7, §§ 17, 18, of the prior Section 17 in the law of 1887 provided for the payment of the damages awarded "as soon as a sufficient amount of the assessments shall have been collected for that purpose;" and by the terms of section 18 the city was not authorized to take possession until the money was thus collected and ready to be paid. Some other provisions of the law need not be particularly referred to. But by the amendment of 1891 it was provided that, the assessment having been confirmed, it should be a lawful and sufficient condemnation, and "the city of St. Paul shall thereupon cause to be paid to the owner of such property the amount of damages over and above all benefits which may have been awarded therefor within six months after date of the confirmation of such assessment, with interest at the rate of seven per cent. per annum;" and (by section 3) that, upon the confirmation of the assessment, the city should have the right to take possession of the premises ordered to be condemned. v.53 M. -21

It is plain that the very purpose of the amendment of 1891 was to impose upon the city the absolute duty to pay the damages awarded in such proceedings, and to change the law requiring payment to be made out of a special limited fund. It may be presumed that this amendment was made in the law by reason of the decision of this court a few months before *In re Lincoln Park*, 44 Minn. 299, (46 N. W. Rep. 355.)

In view of this plain effect of the above act (chapter 12) it may not be very important whether the *prior* act of the same year, (Sp. Laws 1891, ch. 6,) which was both introduced in the legislature and passed before chapter 12, contemplated that the city should be chargeable with the payment of such compensation to the landowner. The later law must be given effect. We will, however, say in this connection that the twenty-fourth subdivision of the section in the earlier of these acts, specifying the purposes for which taxes may be levied, (Sp. Laws 1891, p. 202,) would include, as a proper purpose for the levying of taxes, the providing of means for the discharge of any obligation legally imposed upon the city, as, under the later act, is the duty of paying for lands condemned for public use pursuant to the charter.

The law imposing upon the city the obligation to pay the damages awarded, and only a reasonable time being allowed therefor, interest being added to compensate for the delay, the proceeding was not subject to objection on constitutional grounds. See Commissioners of State Park v. Henry, 38 Minn. 266, (36 N. W. Rep. 874.)

2. The improvement for which assessments were made upon the property of the relators consisted of the widening of East Seventh street from Broadway to Rosabel street, the land condemned for that purpose being a strip on one side of East Seventh street, between the two other streets named. The notice given by the board of public works, the sufficiency of which is called in question, was to the effect that the board would meet at a given time and place to make assessments of damages and benefits arising from this improvement "on the property on the line of said Seventh street from Jackson street to Kittson street, and deemed benefited or damaged thereby." In other words, the notice was, in effect, that the distribution by assessment of the cost of the improvement would be con-

fined to the property on Seventh street between Jackson and Kittson streets. It involved or was based upon a determination by the board, in advance of any notice or hearing, defining the district specially benefited, and upon which therefore, under the charter, the cost should be assessed. It will be seen that the district to be assessed, as indicated in this notice, is not coextensive with the improvement. It is not "the property fronting upon such improvement." Whether it extends beyond the limits of the improvement, or is of less extent, is not probably material. The rule of frontage was not adopted as the basis of the assessment, but the rule of special benefit, irrespective of frontage; and the procedure must be such as is required when assessments are to be made according to the latter rule.

It is apparent from the charter provisions, to which it is unnecessary to refer particularly, that when such assessments are to be made upon what may be conveniently termed the "rule of benefit," as distinguished from the more arbitrary rule of frontage, it is for the board of public works to determine what property is specially benefited. See Rogers v. City of St. Paul, 22 Minn. 494. The question now is whether that board may—as it seems to have practically done in this case—determine this without notice and without opportunity to the parties interested to be heard. The statute answers the question in terms which leave little room for doubt. We refer to Sp. Laws 1887, ch. 7, subch. 7, title 1, § 7, p. 335, which contains these provisions:

"Whenever any order is passed by the common council by virtue hereof for the making of any public improvement " " " which shall require the appropriation or condemnation of any land or real estate, the said board of public works shall, as soon as practicable, proceed to ascertain and assess the damages and recompense due the owners of such land respectively, and at the same time to determine what real estate will be benefited by such improvement, and assess the damages, together with the costs of the proceedings, on the real estate by them deemed benefited, in proportion, as nearly as may be, to the benefit resulting to each separate lot or parcel thereof.

"Sec. 8. The said board of public works shall then give fifteen days' notice by one publication in the official newspaper of the city

of the time and place of their meeting, for the purpose of making said assessment, in which notice they shall specify what such assessment is to be for, and they shall describe the land to be condemned as near as may be by general description, and all persons interested in such improvement shall have the right to be present and be heard. * * * The board shall view the premises to be condemned, and receive any legal evidence that may be offered for the purpose of proving the true value thereof, or the damages that will be sustained, or benefits conferred, by reason of the contemplated improvement."

From a careful reading of this statute it is apparent that the specified notice is required to be given of the time and place of meeting, for the purpose not only of the assessment of damages or compensation for the taking of the land, but also of the assessment of benefits, and that all persons interested are entitled to be heard. such notice and hearing, the board is not authorized to determine upon what district or property the burden shall be imposed, unless, at least, the rule of frontage is adopted as the basis of the assessment; and, since the board is to distribute and assess the whole cost of the improvement upon the property deemed to be specially benefited, if that be possible at least, it follows that any predetermination by the board fixing or limiting, as was done by this notice, the district over which the burden was to be distributed, would be prejudicial to the rights of those owning property within that district. They had a right to have the burden distributed as widely as, after a proper hearing, the board should judge to be just But by this notice the board deprived itself of the power, unless it should proceed de novo under a different notice, to carry the assessment beyond the limits specified in this notice, even though it might appear upon hearing that the special benefit extended much beyond such limits. This was prejudicial to the relators.

For this defect in the notice it is considered that judgment against the property of the relators should not have been allowed, and the same is, as to such property, reversed.

VANDERBURGH, J., absent. (Opinion published 55 N. W. Rep. 143.)

JOSEPH W. PUSHOR vs. VILLAGE OF MORRIS.

Submitted on briefs May 1, 1898. Decided May 22, 1898.

Effect of the Repeal of a Special Law.

By the repeal, in 1803, of Sp. Laws 1889, ch. 278, establishing the town system of caring for the poor in Stevens county, the county system was re-established.

The Repealing Law was Valid.

The law repealing the prior special law was not unconstitutional.

Appeal by plaintiff, Joseph W. Pushor, from an order of the District Court of Stevens County, C. L. Brown, J., made March 27, 1893, sustaining a demurrer to his complaint.

The plaintiff furnished certain poor persons residing in the Village of Morris with necessaries, and brought this action against the Village to recover the value of the food and clothing so furnished. The defendant, the Village of Morris, demurred to the complaint, and it was stipulated between the parties that the only question involved was whether or not the Village was liable for the support of the poor, residing therein since the repeal of Sp. Laws 1889, ch. 273, by Laws 1893, ch. 249. The trial court held the Village was not liable, that the township system of caring for the poor was no longer in force in that county.

Charles B. Marvin and S. A. Flaherty, for appellant.

Wm. C. Bicknell, for respondent.

DICKINSON, J. By this appeal a decision is sought as to the construction and effect of certain legislation, as respects the question whether at this time the care of the poor in the county of Stevens is a duty resting upon the county, or whether that duty rests upon the towns and villages. It is conceded that prior to the legislation of 1889 the county system of caring for the poor, as provided by the General Statutes then in force, 1878 G. S. ch. 15, prevailed in this county.

By Sp. Laws 1889, ch. 273, (approved April 22d,) "each town and incorporated village" in the counties of Stevens and Grant were charged with the duty of the support of the poor in such towns and villages. This may be designated the "town system."

Laws 1889, ch. 170, (approved April 23d,) contained provisions relating both to the county system and the town system, and authorized any county to change from one to the other in a manner prescribed by that law. By section 1 of this act, each county was charged with the care of the poor residing therein, as provided by 1878 G. S. ch. 15, "unless otherwise provided by law." By section 15 it was provided that "all counties in this state which are now under the town system of caring for the poor shall so continue, unless the said system shall hereafter be changed in accordance with the provisions of this act."

By Laws 1893, ch. 249, approved March 11th, the above special law relating to Stevens and Grant counties, (chapter 273,) was, in terms, repealed.

The effect of this legislation was as follows:

- (1) The town system was established in this county by the special act of 1889.
- (2) The general act of the same year (Laws 1889, ch. 170) left it still in force; it being apparent from the provision in section 15 that it was not intended by that act to change the system already established in any county.
- (3) Upon the repeal of the special law, in 1893, the provision in section 1 of the general law of 1889 became applicable to this county, making the support of the poor a county charge; for, in respect to this county, it then ceased to be "otherwise provided by law." If this was not the purpose and effect of the repealing act, it had no practical effect. Even without that repeal the county might have changed from the town system to the county system in the manner prescribed by the general law of 1889.

The repealing act of 1893, ch. 249, was not inhibited by the amendment in 1891 of section 33, art. 4, of the constitution. That amendment expressly authorized the legislature to "repeal any existing special or local law."

Order affirmed.

VANDERBURGH, J., absent.

(Opinion published 55 N. W. kep. 143.)

EDWIN COOLEY vs. MINNESOTA TRANSFER RAILWAY Co.

Argued May 3, 1893. Decided May 22, 1893.

Warehousemen are Subject to Garnishment, Excusing Delivery.

A railway company, after the termination of the transportation of property, and while it is holding the same only as a warehouseman, is liable to garnishment in respect to such property. Such a garnishment at the suit of a stranger to the contract of carriage, while it remains in force, excuses the company from delivering the property to the shipper or consignee.

Lien of Carrier and Warehouseman on Property Pledged.

The lien of the carrier and warehouseman for keeping the property is superior to that of a pledgee who had procured the property to be transported and stored.

Evidence Considered.

Evidence held to conclusively show that the owners of personal property pledged it to the plaintiff to secure their indebtedness to him.

Pledge Held not Surrendered.

A perfected pledge *held* not avoided or terminated by the fact that for a special purpose, and for the benefit of the pledgee, he caused the property to be nominally consigned, on a shipment of the same, to the pledgers.

Pledgee's Rights Superior to Those of Pledgor's Creditors.

A subsequent garnishment by an existing creditor of the pledgors would not thereby acquire a right superior to that of the pledgee.

Sale did not Change Their Relative Rights.

A sale of the pledged property by the pledgers to the pledgee, subsequent to the garnishment, would not extinguish the rights of the pledgee, as between himself and the garnishing creditor.

Appeal by plaintiff, Edwin Cooley, from an order of the District Court of Ramsey County, J. J. Egan, J., made September 10, 1892, denying his motion for a new trial.

On October 14, 1889, at Minneapolis, the plaintiff, Edwin Cooley, signed as surety, or indorsed, notes for the benefit of Cable & Chute, railroad contractors, to the amount of \$7,362.43, due one year thereafter. To secure him against loss, they mortgaged to him on that day their horses and mules and other personal property used in grading. In May following the property was taken

by consent of both parties to Custer City, South Dakota, to work on a railroad which Cable & Chute had contracted to grade at that place. When these notes fell due, plaintiff was compelled to pay them, and in March, 1891, he sent A. D. Polk, his agent, to Deadwood, S. Dak., to take the property or make new arrangements for his indemnity. Cable & Chute then turned over the property to this agent in pledge for the payment of their debt to plaintiff, and he shipped it, eleven car loads, to Minnesota Transfer, near St. Paul, sending men with it and having possession of it. To avoid paying freight it was shipped in the name of, and consigned to, Cable & Chute, for when they took the grading contracts it was agreed that their property was to be taken out there and returned free of freight.

On its arrival, April 8, 1891, the defendant, the Minnesota Transfer Railway Company, unloaded and stored the property and fed the horses and mules, and kept it until May 15th following, claiming a lien on it as warehousemen for the expense and their charges, amounting to \$489. Meantime, on April 13, 1891, William Hogan commenced an action in the District Court against Cable & Chute to recover \$1,500 and interest due him upon a promissory note made by them to him November 25, 1890, and then past due. He made affidavit and garnished the Minnesota Transfer Railroad Company, as having property in their hands belonging to Cable & John C. Bullitt, Jr., was appointed agent of the Railway Company to make its disclosure, and he stated the facts before a referee who reported the disclosure to the District Court. on May 4, 1891, the plaintiff, Cooley, demanded the property, and commenced this action in replevin against the Railway Company, gave bond and took possession of the property. The company answered, claiming a lien for the \$489, and stating the garnishment On June 29, 1891, Cooley agreed with Cable & they were under. Chute to take the property absolutely, and allow them \$5,000 for it upon the debt for which it was pledged. Plaintiff then sold it, realizing \$4,460 for it. Hogan obtained judgment in his suit May 6, He moved the court November 14, 1891, to be 1891, for \$1,603.23. permitted to intervene and become a party to this replevin suit. This motion was unopposed, and he intervened, and filed his complaint in intervention. He claimed that plaintiff's mortgage, the

pledge made in Dakota, and the sale on June 29, 1891, were all invalid, fraudulent and void as against creditors; and this was the question litigated at the trial.

The trial court made findings of fact and ordered judgment against plaintiff for a return of the property, or, if a return could not be had, then that the Railway Company recover \$489, and interest and costs; and Hogan recover \$1,603.23, the amount of his judgment against Cable & Chute, with interest and costs. Plaintiff moved for a new trial, and being denied, appeals.

A. D. Polk and Henry C. James, for appellant.

The contract of pledge was followed by immediate and continued change of possession. We cannot imagine on what theory the court could find that it was void as to the intervener. He does not claim that his lien was prior, nor does he seek to set aside the transfer to plaintiff as a preference contrary to the insolvency laws. Conceding for the purpose of the argument, that the mortgage was void as to creditors because not properly filed, yet the plaintiff in this case does not claim wholly by virtue of his former mortgage, nor did he by his own act alone, attempt to remove the former taint, if any existed, as in the case of Stein v. Munch, 24 Minn. 390. The law laid down in First Nat. Bank v. Anderson, 24 Minn. 435, is applicable here. Combs v. Tuchelt, 24 Minn. 423; National Ex. Bank v. Wilder, 34 Minn. 149.

John C. Bullitt, Jr., for defendant Railway.

To maintain an action of replevin, the plaintiff must have a right to the immediate possession of the property, and this right must exist at the time of the commencement of the action. Before any demand was made by plaintiff, the garnishee summons in the case of Hogan v. Cable & Chute had been served upon the Railway Company, and delivery was refused upon the ground that the property had been garnished, and upon the further ground that the bill of lading issued by the Omaha Railway Company was not presented at the time of the demand. Cooley was notified of the pendency of this garnishment, and that this proceeding was one of the reasons for refusal to surrender possession of the property to him. It would seem clear that no matter who was the owner of

the property, the defendant was justified in refusing to deliver the same to any one subsequent to the service of the garnishment summons. 1878 G. S. ch. 66, § 167.

Moritz Heim and John D. O'Brien, for intervener.

The intervention of Hogan was proper, and was adjudicated to be proper by the court in making an order allowing the intervention, from which no appeal has been taken. Its propriety was also recognized by the plaintiff in pleading to the complaint of the intervener, and the allowance of said intervention is not assigned as error, nor is any argument attempted upon that point.

The evidence on behalf of plaintiff not only failed to show an actual and continued change of possession of the property under the pretended pledge, but it really showed that there was no visible or outward change of possession at all.

The mortgage was confessedly void as to creditors, and recovery thereon is not insisted upon by plaintiff. After the property had been taken upon the writ of replevin, and after the intervener had acquired an attachment thereon by the service of the garnishee summons, the plaintiff purchased the property from Cable & Chute. This we think was a waiver and relinquishment of any claim that the plaintiff might have, as pledgee of the property. Since the ownership of this property was acquired by plaintiff, subsequent to the intervener's garnishment, it cannot affect the intervener's right, and the plaintiff cannot revive his interest and title as pledgee, in which character he no longer holds, for the purpose of defeating the intervener's claim.

DICKINSON, J. This was an action of replevin to recover forty-three horses and mules which, in the course of transportation by rail from Deadwood, Dak., to St. Paul, had been delivered to the defendant, the Transfer Railway Company, and unloaded, and left in its yards. The possession of the property by the railway company was rightful; at least, until it refused to deliver it to the plaintiff, upon his demand, on the 14th day of April, 1891. The property had been owned by Cable & Chute prior to March 20th of that year. The plaintiff's asserted right to recover it rests upon the alleged fact that at the latter date, at Deadwood, Cable & Chute

had delivered it to the plaintiff in pledge, to secure him for certain indebtedness and liability incurred in their behalf; it being agreed that the plaintiff should take the property to St. Paul, and dispose of it for his reimbursement.

The railway company asserts a lien upon, and right to retain possession of, the property, on account of its charges for feeding and caring for the same, (amounting to \$489,) from the time when it was received by it, April 8th, until it was taken by the plaintiff in this action of replevin, on the 15th day of May.

While the railway company was so holding the property, and before the plaintiff demanded that it be surrendered to him, William Hogan had commenced an action on contract against Cable & Chute for the recovery of \$1,500 and interest, and had caused process of garnishment to be served upon the railway company on account of its holding this property, which Hogan claimed to belong to Cable & Chute. During the pendency of this action of replevin, Hogan was allowed, upon his motion, to intervene, as a party therein, without objection, so far as appears. He had then recovered judgment in his action against Cable & Chute. His contention in this action is that the property belonged to Cable & Chute, and that he secured a lien thereon by virtue of the garnishee proceedings, and that as to him the alleged pledge to the plaintiff was invalid, if any such pledge was made.

The plaintiff, having taken the property by virtue of the process in this action, sold the same.

The court, deciding the case without a jury, found that Cable & Chute "pretended or attempted" to pledge the property to the plaintiff, but that this was void as to creditors, and as to the defendant, and that, as to the intervener, (Hogan,) Cable & Chute remained the absolute owners. Judgment was allowed in favor of the railway company, against the plaintiff, for the recovery of the amount of its charges for keeping, \$489, and in favor of the intervener, Hogan, and against the plaintiff, for the recovery of the amount of his (Hogan's) judgment against Cable & Chute. This appeal by the plaintiff is from an order refusing a new trial.

A chattel mortgage had been given by Cable & Chute to the plaintiff, covering some, but not all, of the property here involved, long before the alleged pledge. We deem this of little importance,

for, if we could ascertain from the case what part of this property was included in the mortgage, it does not appear what was the value of the same. The plaintiff's case really rests upon the pledge, rather than upon the prior mortgage.

The case, as between the plaintiff and the railway company, seems plain, irrespective of the question as to the sufficiency and effect of the pledge. When the plaintiff demanded possession of the property, there having been a delay of several days on account of some unadjusted claim of charges for transportation, the defendant was not holding the property in the relation of a carrier, but as a warehouseman, and such had been the case for some six days; and in the meantime, and just before such demand, the garnishment had been made in behalf of Hogan. The garnishment legally charged the company with the responsibility of retaining the property, as in the custody of the law, in order that it might be applied to the satisfaction of Hogan's debt, if he should succeed in maintaining his claim. It excused the company from delivering the property to the plaintiff. Drake, Attachm. 453; Stiles v. Davis, 1 Black, 101. Whether goods in the possession of a common carrier, and while actually in transit, may be the subject of garnishment, we do not consider. We do not construe the finding of the court to be that the defendant retained the property as a common carrier.

The defendant company had a lien upon the property for its proper charges for keeping it; and the determination of the court, awarding a recovery therefor against the plaintiff, who had replevied and sold it, was justified by the evidence, and was in accordance with the law. Whether the pledge was complete and effectual, or not, the result, in this particular, would be the same.

Different questions are presented, as between the plaintiff and the intervener. As between them, the question is one of priority of rights. If the pledge to the plaintiff was complete and effectual, and was still in force at the time of the garnishment by Hogan, any rights which the latter might acquire by the garnishment would be subordinate to those of the plaintiff as pledgee.

It does not appear on what ground, or for what reason, the court found the pledge to have been void as to Hogan, a creditor of Cable & Chute. If it was because the evidence was deemed insufficient to establish the fact of the pledge having been made at Deadwood,

we should be compelled to say that the court had failed to fully appreciate the force of the evidence; for, as we read it, it is all one way, and was of such a nature as to forbid any other conclusion than that the property was, by Cable & Chute, actually and completely delivered to, and taken possession of by, the plaintiff, to be by the latter retained, and disposed of for his reimbursement. It may be supposed, however, that the court considered that the circumstances connected with its transportation to St. Paul avoided or terminated the pledge, or precluded the plaintiff from asserting his rights as a pledgee, as against Hogan. These circumstances were as follows:

Cable & Chute had taken the property to Deadwood pursuant to some agreement with Streeter & Co., who had some contract or work of railroad construction there. Cable & Chute had a subcontract under Streeter & Co., and their agreement with Streeter & Co. involved an undertaking on the part of the latter to furnish transportation for this property to Deadwood, and back to St. Paul. Cable & Chute had completed their contract, so that they were entitled to call upon Streeter & Co. to have the property returned to St. Paul without expense to them. When the property was pledged to the plaintiff, his agent, who had it in his possession, arranged with Cable & Chute to conceal this fact from Streeter & Co., lest the latter should refuse to abide by their agreement to have it transported back to St. Paul. the shipment was made in the name of Streeter & Co., and Cable & Chute were named as consignees; and Streeter & Co. arranged the matter of transportation so that no charge was made therefor to the plaintiff, nor to Cable & Chute.

This did not avoid or terminate the pledge. The plaintiff em ployed an agent who remained in charge of the property during its transportation to St. Paul. The possession was never in fact restored to Cable & Chute, nor do they appear to have ever claimed to be in possession after they delivered the property to the plaintiff. As between those parties, it is certain that the pledge remained effectual. Even if, after the property had been delivered in pledge to the plaintiff, the latter had intrusted it again to the pledgors as his agents or bailees for the special purpose of taking it to St. Paul in his behalf, to be there again restored to him, we

suppose that the pledge would remain good. The possession of the original pledgors, as the agents of the pledgee, would be his possession. Casey v. Cavaroc, 96 U. S. 467. But, however that may be, this case is stronger for the plaintiff than that just supposed, for the property was not in fact redelivered to the pledgors, but remained, uninterruptedly, in the custody of the plaintiff's agent.

The fact that the plaintiff, for the purpose above stated, employed the names of Cable & Chute as consignees, so that it might appear that the property was shipped for them, did not, as we have said, divest the plaintiff of his pledge. Neither did it subordinate the plaintiff's rights, as pledgee, to the subsequent claim of Hogan under the garnishment, or estop the former from claiming the preference which his pledge secured to him. There is no registry law relating to the pledging of property. If the pledge was effectual, it is not material whether Hogan had notice of it or not. debt was not created in reliance upon any appearance of continued possession, or of absolute title, in Cable & Chute, by reason of their being named as consignees. It long antedated the transactions here in question. Nor, even if the concealment of the pledge from Streeter & Co., for the purpose stated, was a fraud upon the latter, it would not affect the case of Hogan. It did not concern him in But it is not even apparent that the concealment was a fraud upon Streeter & Co. Their agreement to secure free transportation back to St. Paul was not discharged by the pledging of the property to the plaintiff. In brief, the pledge to the plaintiff was valid, and was prior and superior to any rights acquired by the subsequent garnishment, and there is nothing in the case to estop him from asserting his superior right.

A considerable time after the garnishment, while the plaintiff still held the property, it seems that Cable & Chute sold the same to him for a specified price, which he was to apply as payment on the indebtedness to him. It is contended that thereby the plaintiff waived and lost his rights as pledgee, so that, by reason of the garnishment, the intervener's rights were superior to any remaining in the plaintiff. We cannot so hold. The transfer of the legal title, for a specified price, to be applied on the debt, was not inconsistent with, and did not divest the plaintiff of, the essential

rights which he already had under the pledge; that is, the possession of the property, and the right to dispose of it for the satisfaction of his debt. That right still remained, as against creditors of the pledgor who might have secured attachments subsequent to the pledge. It may be that the added interest which the sale conferred—the legal title—was held subject to the intervening garnishment, and that the plaintiff might be accountable to the intervener for the value of the property in excess of the debt, if there was any such excess. But the case does not present that question.

It is unnecessary to consider whether the claim of the intervener was a proper subject of litigation in this action.

As between the plaintiff and the defendant railway company, the order is affirmed. As between the plaintiff and the intervener, it is reversed.

VANDERBURGH, J., did not take part in this decision.

Application for reargument denied June 7, 1898.

Note. The clerk's taxation of costs and disbursements in favor of the appellant, against the intervener, was reduced June 18, 1893, from \$278.50 to \$213.70, by deducting \$64.80 from the amount charged for printing the Paper Book of 214 pages.

(Opinion published 55 N. W. Rep. 141.)

JACOB R. MYERS et al. vs. DULUTH TRANSFER RAILWAY Co. et al.

Argued April 26, 1893. Decided May 22, 1898.

Dissolution of Injunction.

Order sustained, which dissolved a temporary injunction, restraining the defendant from constructing its railroad over the plaintiff's premises.

Appeal by plaintiffs, Jacob R. Myers, Henry H. Myers and Benjamin F. Myers, from an order of the District Court of St. Louis County, O. P. Stearns, J., made August 6, 1892, dissolving a temporary injunction.

The plaintiffs owned one undivided third of thirteen lots in Martin's Division in Duluth. The defendant, the Duluth Transfer



Railway Company, surveyed and located its railway across these lots, and was about to construct its road over them. It had attempted to acquire the right of way through the lots by proceedings under 1878 G. S. ch. 34, title 1. It had filed its petition and had obtained an order appointing commissioners to appraise damages, but Myers Brothers had appealed to this court from that order. The commissioners however proceeded to appraise the damages and made their award, and the Railway Company paid the amount into court. The plaintiffs commenced this action August 2, 1892, to restrain the Railway Company and the contractors, the Calumet Construction Company and Foley, Grant & Gutherie, from grading the road through these lots. On the next day they obtained ex parte from Phineas Ayer, Court Commissioner of St. Louis County, an order for a temporary injunction, and it was issued restraining defendants from entering upon the lots and from grading the road across them. The writ was served. On August 4, 1892, defendants served their verified answer and obtained an order from Judge Stearns, of the District Court, requiring plaintiffs to show cause, if any they had, on August 6, 1892, why the injunction should not be dissolved. On that day the court made an order dissolving it. From this order plaintiffs appeal. Pending this appeal the plaintiffs commenced a new action joining other subcontractors as defendants, and obtained another ex parte order. Certiorari to review proceedings in contempt for disobeying it are reported in State ex rel. v. District Court, 52 Minn. 283.

- R. R. Briggs, for appellants.
- J. L. Washburn, for respondents.

Dickinson, J. This action is prosecuted to restrain the defendant railway company from constructing its railroad across certain land, an undivided one-third of which is owned by the plaintiffs. Upon the commencement of the action a temporary injunction, restraining the defendants from constructing the road, was issued upon the ex parts order of the court commissioner. After the service of a verified answer, the court, upon the defendants' motion, dissolved the injunction. This is an appeal by the plaintiffs from the order of dissolution. The motion was heard and granted

upon the pleadings, and upon the record of certain condemnation proceedings through which the defendant railway company claims to have acquired the right to construct its road over these premises.

On the part of the defendants it was made to appear that in May, 1892, the railway company instituted condemnation proceedings to secure a right of way over these premises; and in the course of such proceedings, after due notice, the petition of the railway company was heard by the district court, where it was determined that the taking of the premises in question was necessary, and commissioners were appointed to assess the compensation to be paid therefor to the plaintiffs, among others.

This order was filed June 29th. On the 8th or 9th of July, while the commissioners thus appointed were proceeding with the condemnation proceedings, the plaintiffs appealed to this court from the order appointing such commissioners. The plaintiffs executed the usual statutory stay bond on such appeal. On the 9th of July the commissioners executed their award and report, which was filed in the clerk's office July 12th, determining the compensation to be paid to the plaintiffs and others for the taking of this land. The amount thus awarded to the plaintiffs was tendered to them, but refused, and it was then deposited in court, to be paid under its direction. Afterwards the railway company entered upon the premises, and commenced the construction of its road; and thereupon, about the 1st of August, the plaintiffs commenced this action to restrain the defendants, and for the recovery of damages for the acts done on the land. The premises were vacant and unoccupied.

The granting, refusing, or dissolving of a temporary injunction pendente lite, while the issues involved in the action are untried, must necessarily rest largely in judicial discretion, to be exercised with regard to the circumstances of the case. That discretion will be influenced by a consideration of the relative injury and inconvenience which may be likely to result to the parties, respectively, from the allowance or disallowance of such relief. High, Inj. 598. And where it is sought to thus restrain the prosecution of an enterprise of a quasi public nature, as is the case here presented, the court may also consider how far public v.53m.—22

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interests may be affected by a suspension of the undertaking. Even where it has been finally determined that a railroad has been wrongfully constructed on the plaintiff's premises, an injunction has been withheld to enable the company to proceed to effect a legal condemnation of the land. Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215, 229. (Gil. 188;) Lohm in v. St. Paul, S. & T. F. R. Co., 18 Minn. 174, 175, (Gil. 157.) And see Wood v. Charing Cross Railway Co., 33 Beav. 290.

As this case was presented to the court on the motion for the dissolution of the temporary injunction, the court would have been justified in the conclusion (and we may assume that this was its conclusion) that the prosecution of the work sought to be enjoined would not irreparably, or even seriously, injure the plaintiffs' property; that the defendant was empowered to acquire the right of way by condemnation; and that, in good faith, it had instituted and carried forward the proceedings for that purpose to the point of the making of an award of damages, and tender of payment, before it had entered upon the land. In view of these considerations, and of the injury which might result from the suspension of such a work, we think that it would have been fairly within the discretion of the court to have refused a temporary injunction; and, if an injunction might have been refused in the first instance, the court might dissolve one granted ex parte. Of course, if the defendants' acts were unlawful, the plaintiff is not without a remedy therefor.

Order affirmed.

VANDERBURGH, J., did not sit. (Opinion published 55 N. W. Rep. 140.)

JOHN MCMANUS et al. vs. ROBERT LOUDEN.

Argued by appellant, submitted on brief by respondents, April 28, 1893. Decided May 22, 1893.

Custom, Evidence of, Inconclusive.

Evidence tending to prove a particular custom to treat the word "cord," in the measurement of cedar posts, as comprising 256 cubic feet, held so inconclusive that the verdict of the jury to the contrary should be sustained.

Appeal by defendant, Robert Louden, from an order of the District Court of St. Louis County, *Charles M. Start*, J., made April 22, 1892, denying his motion for a new trial.

On August 13, 1891, the plaintiffs, John McManus, Charles McManus and Edward McManus, made a contract in writing with defendant, for two dollars per cord, to haul all the cedar posts as fast as cut on section fourteen (14), T. 59, R. 4, in Cook County, and bank the same on the shore of Lake Superior. They performed the contract on their part, and brought this action to recover the unpaid balance of the price. Plaintiffs had a verdict February 11, 1892, for \$509.37. Defendant made a motion for a new trial. Being denied, he appeals.

S. L. Smith and Cotton & Dibell, for appellant, cited 1 Greenl. Ev. § 295; Miller v. Stevens, 100 Mass. 518; Smith v. Wilson, 3 Barn. & Adol. 728; Walker v. Barron, 6 Minn. 508, (Gil. 353;) Pevey v. Schulenburg & Boeckler Lumber Co., 33 Minn. 45; Keavy v. Thuett, 47 Minn. 266.

H. S. Lord and John H. Norton, for respondents.

DICKINSON, J. By a written contract between these parties, the plaintiffs agreed to haul the "cedar posts," to be cut on specified tracts of land, for which the defendant agreed to pay two dollars "per cord." Having done the work, the plaintiffs seek by this action to recover a part of the stipulated price, which is claimed to have been unpaid. The issue to which this appeal relates is as to the number of cords of posts hauled, and this depends upon the

meaning of the word "cord" in the contract. The plaintiffs claim that this word as used in the contract, has the ordinary and well-understood meaning,—128 cubic feet. The defendant's contention is that, in accordance with a particular custom, in estimating the quantity of cedar posts the word "cord" designates a cubic measurement of 256 feet. The verdict, in favor of the plaintiffs, is to be regarded as expressing the conclusion of the jury that the evidence did not establish the existence of such a custom; at least, as respects the business of hauling or transporting such property. The question now before us, on this appeal from an order refusing a new trial, is whether the evidence required a contrary conclusion as to the fact of the existence of the alleged custom.

It seems that such cedar "posts" are largely cut and sold to be sawed into blocks for street paving, and that in general the posts are about eight feet long.

Considerable evidence was introduced, going to show the existence of a particular custom, in dealing in such cedar posts in this part of the country, to regard a cord as comprising 256 cubic feet. But we agree with the conclusion of the learned judge, whose decision is here for review, that the proof was so inconclusive as to the existence of the alleged custom that the verdict of the jury should not be set aside.

The word cord, in the contract, is of common use, and in general of well-known and unvarying meaning. Its meaning is of even mathematical certainty. It was not sought to be shown that its common meaning did not prevail generally in this locality, but only that in the measurement of cedar posts it had a very different signification; being then understood as expressing the quantity of 256 cubic feet. The proof of the particular usage was opposed to the general and ordinary meaning and use of the word. To establish the alleged custom it was necessary that the proof should show a uniform use of the word, in this particular business, in a sense entirely different from its still generally prevailing significa-This peculiar use should appear to have been so general that all persons dealing in respect to the subject must be presumed to have known, and to have contracted with reference to, that customary usage.

While the proof tended strongly to show a somewhat common practice in accordance with the defendant's claim, it did not conclusively show that the practice had been so uniform that it could be declared, notwithstanding the opinion of the jury to the contrary, that it had ripened into a custom. There was evidence reasonably tending to show that the practice or usage was of somewhat recent origin in this locality, and that it was not uniform; that the term "cord," or "single cord," was still used, even in respect to cedar posts, in its ordinary signification; the quantity of 256 cubic feet being regarded as a "double cord." It may be added, as was noticed by the court below, that the defendant's own conduct was such as to justify doubt whether he understood the word "cord" as having any other than its general meaning. If it meant 256 cubic feet, he had overpaid the plaintiffs on the contract to a considerable amount. It appeared that the plaintiffs had no knowledge of the alleged custom or usage. The question was properly for the jury.

Order affirmed.

Vanderburgh, J., being absent by reason of sickness, did not participate.

(Opinion published 55 N. W. Rep. 139.)

HANS P. SLETTE vs. GREAT NORTHERN RAILWAY Co.

Argued May 4, 1893. Decided May 22, 1898.

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Negligence—Excessive Speed of Freight Train.

Evidence showing the running of a freight train at excessive speed held to justify the conclusion that it was negligence and a proximate cause of a collision with a hand car running over the road in advance of the train.

Section Man not Negligent in Obeying Section Boss.

Evidence held to justify the conclusion that the foreman of the hand car was negligent in not having stopped and taken the car off the track,

he knowing that the train was following; also that the plaintiff, a section man on the car, under the direction of the foreman, might be deemed not negligent, even though the foreman was negligent.

Verdict Excessive.

A verdict for \$4,100 for a broken leg held excessive.

Appeal by defendant, the Great Northern Railway Company, from an order of the District Court of Yellow Medicine County, Gorham Powers, J., made September 16, 1892, denying its motion for a new trial.

M. D. Grover and C. Wellington, for appellant. Spooner & Taylor, for respondent.

DICKINSON, J. The plaintiff was a section man in the defendant's service. He and his foreman, one Palmer, went out from Cottonwood station with a hand car, going northeast, to engage in their work on the road. Only these two men were on the car. knew then, from seeing the smoke of the engine, that a train was coming towards Cottonwood from the southwest, the train being then about two miles away, according to the plaintiff's testimony, but much more than that according to some of the evidence. It was an irregular freight train, not running on schedule time. The railway track over which the hand car was run seems to have been constructed on an embankment, but there were two farm crossings where the car might be taken off to let the train pass. was about a half mile from Cottonwood and the other a half mile further on. Between the first and second crossings there was a steep descending grade, going northeast, and a bridge and a reverse curve in the road. When the men started out, the purpose was to run to the first crossing, and take the car off there to let the train pass; but when they reached that place, the car then running rapidly, the foreman determined to run on to the second crossing, and by his direction they went on without stopping. The plaintiff thinks that the train was then about a half mile distant. down grade, and with a favoring wind, they ran the car rapidly; but before reaching the bridge the train came in sight, it being then, as estimated, from 900 to 1,100 feet from the hand car. engineer then first saw the car and tried to stop the train.

kept on with the hand car until he had crossed the bridge. Then the car was stopped, and the two men attempted to take it off the track. They had not time to fully do this before the engine came up. The plaintiff ran out to the side of the embankment, as he testifies, before the engine struck the car. The car was thrown upon him, and his leg broken. He prosecutes this action to recover for the injury.

The court instructed the jury to consider the question of the alleged negligence of the defendant in only two particulars: First, as to the speed of the train; and, second, as to the negligence of the plaintiff's foreman. Involved with these was also the question whether the plaintiff was also guilty of negligence.

We are of the opinion that the evidence as to the speed of the train and as to the plaintiff's conduct presented a case for the jury, both as respects the negligence of the defendant and the contributory negligence on the part of the plaintiff.

There were fifteen loaded cars in the train. It passed the station at Cottonwood, without stopping, at a rate of speed estimated by several witnesses at from thirty to thirty-five miles an hour, although evidence on the part of the defendant tended to show that the speed was not more than sixteen or seventeen miles an hour. The running regulations forbade such trains to pass stations at a speed greater than eight miles an hour. The train was provided only with hand brakes. If the train was running at the greater speed above mentioned, it was very much in excess of that allowed by the regulations of the defendant, as it would seem, and much greater than the ordinary speed of freight trains at that place. the train had been running at only the ordinary rate of speed it is reasonable to suppose that the accident might not have occurred. In the view of the jury the extraordinary speed of the train may have been a proximate cause of the collision. But intimately related to this feature of the case is that of the plaintiff's own con-For one not employed in railway service to risk his life by duct. attempting to run a hand car in advance of a train known to be approaching, would, of course, be negligence. But such a conclusion is not a matter of course in the case of railroad section men, whose duty requires them to thus be upon and pass over the railway, although there may be obvious danger in so doing.

the fact that such conduct is dangerous it does not necessarily fol-The service neclow that it should be characterized as negligence. essarily involves exposure to danger, and the question of the propriety of the servant's conduct must be considered with regard to the nature of the service and the duties which he has to perform. It could not be said as a matter of legal inference that these section men were negligent, in view of the duties connected with their service, in starting out from their station to run a half mile to the first crossing, although they knew that a train was following them, which might stop for a considerable time at the station, although it might not, as it did not, stop at all. That was a question proper to submit to the jury. Nor do we feel at liberty to say that the plaintiff is conclusively chargeable with negligence from the fact that the car was not stopped, or that the plaintiff did not get off, at the first crossing. According to the evidence the car passed there at a speed of sixteen miles an hour, making it unsafe for the plaintiff to get off. He had not the control of the car, but was working under the direction of and with the foreman, who then told him, as the plaintiff testified, to "work hard to the next crossing." He did not know, as may be supposed from the evidence, that the train was coming at an unusual rate of speed. It was not unnatural that he should defer somewhat to the judgment and direction of the foreman, and, as the latter was, as we understand, also engaged in propelling the car, the plaintiff might well be at a loss as to what he should do, even if he had appreciated the danger of The time for decision would seem to have been but brief, as the first crossing where the car could be conveniently taken off was quickly passed, and the car running on an embankment, as we understand. Under the circumstances, we think that it was for the jury to say whether the plaintiff was chargeable with want of such care as ordinarily prudent men would exercise in the same situation.

Our conclusion is the same as respects the subsequent conduct of the plaintiff. The necessity for endeavoring to take the car off the track, so as to prevent a collision, was apparent; not merely because of the danger to property, but from a regard to the safety of the persons on the train. The evidence justified the belief that the plaintiff, after having tried to get the car off, attempted to get out of the way of danger when it became apparent that a collision was inevitable.

The court submitted to the jury the question whether the plaintiff's foreman was chargeable with negligence. Although the foreman was a fellow servant with the plaintiff, yet, under Laws 1887, ch. 13, the negligence of the fellow servant might constitute a ground for recovery against the master. Steffenson v. Chicago, M. & St. P. Ry. Co., 45 Minn. 355, (47 N. W. Rep. 1068.) We think that the case presented was proper for the consideration of the jury upon the point as to whether the foreman was negligent in not stopping at the first crossing, or beyond that point, as soon as it was discovered that the train was overtaking the hand car. The foreman may have been chargeable with negligence, and yet the plaintiff may be deemed to have been not negligent. The foreman could have Presumably the plaintiff would have lent stopped the car at will. his aid in doing so if the foreman had not determined to go on. testifies that he suggested at the first crossing that they should On the other hand, as has been already said, the plaintiff was not controlling the movement of the car, nor propelling it alone; and for him to have refused to lend his aid in propelling might have increased, rather than averted, the danger, unless the foreman had deferred to him, and relinquished his determination to go on.

But it is contended that the verdict was excessive, and we think that it must be so considered. It was for \$4,100. The plaintiff was thirty years of age. He was earning \$35 a month, and there is no suggestion that his earning capacity was greater than was thus in-The injury consisted only in a transverse fracture of the As appears by the testimony of the physician called by the plaintiff, his recovery had been satisfactory, but, as is common in such cases, the leg was shortened from half to three-quarters This would cause the plaintiff to limp in walking, but of an inch. even this would be obviated by wearing a high-heeled boot. physician considered that the leg would be as good as ever, save as above indicated, and excepting also that it might be expected to tire a little quicker from this cause, and that there might be a tendency to rheumatic pain. Of course, the pain, loss of time, and expense (\$100) incident to such an injury are to be considered.

in view of the whole case, we are unable to resist the conclusion that the verdict was beyond the proper limits of mere compensation. Taking the plaintiff's own showing as to his earning capacity, the amount of the verdict is equal to the sum of his earnings for nine and a half years' labor; and that is to be recovered in advance and at once. The interest on that sum at six per cent. a year would be considerably more than one half of what he has been accustomed And yet it seems to be apparent that his earning capacity for the future will be but little, if at all, impaired. It is not without reluctance that we determine that the verdict should not stand; but the growing tendency in the direction of extravagant verdicts in this class of cases should prompt the courts to see to it that the bounds of reasonable compensation be not plainly exceeded, unless the case justifies punitory damages, as this case does not. this cause alone the order denying a new trial is reversed.

VANDERBURGH, J., did not participate.

On June 13, 1893, this court, on motion of the plaintiff and notice to defendant, modified the decision, so that the order denying a new trial is reversed, unless within twenty days after the filing of the mandate from this court to the District Court, the respondent shall file in the latter court his consent that the verdict and the judgment to be entered thereon be reduced to the sum of two thousand and one hundred dollars; and that, if such consent shall be filed, the order denying a new trial shall stand and be affirmed. [Reporter.

(Opinion published 55 N. W. Rep. 137.)



IN RE ARNY GRUNDYSEN, Sheriff of Polk County.

Argued May 18, 1898. Decided June 1, 1898.

Redemption Money Paid to a Sheriff is Received by Virtue of His Office.

Money paid to a sheriff to redeem land from a foreclosure sale is money received by him "by virtue of his office," within the meaning of 1878 G. S. ch. 8, § 198, as amended in 1885.

A Statutory Foreclosure not Embraced in 1878, G. S. ch. 88, § 9.

The foreclosure of a mortgage under a power of sale is not "a special proceeding," within the meaning of 1878 G. S. ch. 88, § 9.

Authority of Attorney Employed to Foreclose under a Power in a Mortgage.

The mere employment of an attorney to foreclose a mortgage does not give him authority to receive from the sheriff money paid after foreclosure to redeem the property from a sale to the mortgagee.

Appeal by W. H. Williams from an order of the District Court of Polk County, Frank Ives, J., made January 14, 1893.

Eli Lariviere and wife mortgaged to Williams two hundred acres of land in Polk county. When the debt fell due it was not paid, and Williams employed Messrs. White, Reynolds & Schmidt, attorneys at law of Duluth, to foreclose the mortgage by advertisement under the power of sale therein. The foreclosure sale was made November 9, 1891, by Arny Grundysen, Sheriff of Polk County. Williams bid and became the purchaser for \$901.84, and received the sheriff's certificate. The owner redeemed the land November 7, 1892, by paying to the sheriff the money and interest. White, Reynolds & Schmidt demanded the money of the sheriff, but he refused to pay it over to them, unless they produced some authority from Williams to receive it. They, on affidavit of the facts, obtained from Judge Ives an order that the sheriff show cause before the court at Moorhead on January 3, 1893, why he should not pay over the money to them with twenty per centum thereon as damages for failure to pay on demand. The sheriff appeared and showed that he had deposited the money in First National Bank of Crookston the day of the redemption, and had it ready at all times since to pay over to Williams on demand, or to any one having authority from him to receive it, but admitted that he refused to pay it to White, Reynolds & Schmidt because they produced no authority from Williams to receive it. The order was discharged with costs, and they brought this appeal in the name of Williams.

White, Reynolds & Schmidt, for appellant, cited Coykendall v. Way, 29 Minn. 162; Breuer v. Elder, 33 Minn. 147; Kumler v. Brandenburg, 39 Minn. 59; Jenney v. Delesdernier, 20 Me. 183; Gordon v. Coolidge, 1 Sumn. 537.

A. A. Miller, for respondent.

MITCHELL, J. This was a summary proceeding, under 1878 G. S. ch. 8, § 198, as amended by Laws 1885, ch. 74, against the sheriff

of Polk county, to compel him to pay over certain moneys received by him by virtue of his office, together with twenty per cent. damages and costs.

The material facts are that the law firm of White, Reynolds & Schmidt, of Duluth, foreclosed by advertisement for Williams, a resident of New York, a mortgage on certain real estate in Polk county, their names appearing as his attorneys in the printed notice of sale, and they, as such, attending to the foreclosure proceedings throughout. At the sale the property was bid off in the name of Williams, the mortgagee, to whom the usual certificate was executed by the sheriff who conducted the sale. Just before the expiration of one year from the date of sale, the land was redeemed, the redemptioner, as authorized by statute, paying the money to the sheriff. Thereupon White, Reynolds & Schmidt demanded the money, as attorneys for Williams. The sheriff refused to pay it over unless and until they produced an order from Williams for the money, or some other evidence of their authority from him to receive it. This they declined to do, resting their right and authority to demand this redemption money upon their employment by Williams to foreclose the mortgage. Upon the refusal of the sheriff to comply with their demand, these proceedings were commenced.

We have no doubt that this money was received by the sheriff "by virtue of his office," within the meaning of the statute. The amendment of 1885 was unquestionably passed to cover, among others, just such cases.

The authority of White, Reynolds & Schmidt to demand and receive this money is put on two grounds. The first is under 1878 G. S. ch. 88, § 9, which provides that an attorney has authority "to receive money claimed by his client in an action or special proceeding, during the pendency thereof, or within two years after judgment, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment."

The contention is that the foreclosure of a mortgage under a power of sale is "a special proceeding," within the meaning of this statute. If the phrase "special proceeding" could be dissected, and lexicographers' definitions of each word separately adopted, it could be made to include almost anything. But in our statutes, in

common with all the reformed codes of procedure, it has a well-understood meaning. It is a generic term for all civil remedies in courts of justice which are not ordinary actions. It always has reference to a proceeding in court which may culminate in a judgment; and it is evidently in this sense in which it is used in this statute. It does not include a foreclosure under a power of sale, which is a proceeding wholly in pais.

The case therefore resolves itself into the question whether an employment of an attorney to foreclose a mortgage in this manner confers authority to receive the redemption money, where the property is subsequently redeemed from a sale to the mortgagee. is to be determined by the general rules of the law of principal and agent. Of course, authority to do a particular thing carries with it every power necessary to accomplish the object; in other words. the power to use all appropriate means necessary to accomplish the desired end. As in every other case, the intention of the parties is the cardinal test. The extent of the implied authority depends on the nature of the business to be transacted; but implied authority is never to be extended beyond its legitimate scope. It is also a cardinal rule of the law of agency that the agency is always terminated by the accomplishment of its object; when it is created for the purpose of performing some specific act or acts. the agency will be terminated by the accomplishment of the purpose which called it into being. When an attorney is employed to "foreclose" a mortgage, we think the common understanding is that this refers to the proceedings which culminate in the sale of the property, and the preparation and record of the papers evidencing that sale. If it should happen, which it rarely does, that another party buys at the sale, we think that the authority to foreclose would fairly imply authority to receive the money from the purchaser. But if, as is usually the case, the property is bid in by the mortgagee, we think that the agency of one employed to foreclose would have accomplished its object and be terminated when the sale proceedings were completed, and the proper evidences of sale and muniments of title under it were prepared or procured; and that a mere employment to foreclose would not confer authority, in case of redemption or attempted redemption from the sale, to pass upon the validity or sufficiency of the redemption, or to collect

the redemption money from the sheriff. Hence we think the sheriff had the legal right, if he insisted on it, to require evidence of the authority of White, Reynolds & Schmidt to receive the money.

It is suggested that, in any event, the court should have in these proceedings, which were instituted by Williams himself, ordered the sheriff to pay over the money. But we do not think a party has a right to use these summary proceedings for any such purpose. They were designed to apply exclusively to sheriffs who were previously in default in the performance of their legal duty.

Order affirmed.

Vanderburgh, J., absent, took no part. (Opinion published 55 N. W. Rep. 557.)

GEORGE M. HOLMES et al. vs. STATE BANK OF DULUTH.

Argued by appellants, submitted on brief by respondent, May 17, 1893. Decided June 1, 1898.

Innocent Purchaser of Usurious Security, Who is.

Where property is sold on a usurious mortgage, one who purchases at the foreclosure sale, and pays his money, without any notice of the usurious character of the mortgage, is protected as a bona fide purchaser of the property; and the same is true where, after the foreclosure sale, and before the expiration of the time of redemption, a person buys the interest or estate of the mortgagee, who bid in the property at such sale.

Purchase of Accommodation Paper, when not Usurious.

Where one buys an accommodation note of the payee, not knowing that it was accommodation paper, but supposing that it was already a valid subsisting security in the hands of the payee, the transaction is not usurious, although he bought the paper at a discount greater than the legal rate of interest.

Appeal by plaintiffs, George M. Holmes and Byron G. S g g. from a judgment of the District Court of St. Louis County, J. D. Ensign, J., entered September 30, 1892.

Plaintiff Holmes on March 18, 1889, made to John Gonska, his note and a mortgage for \$350, on the north half of southeast quarter,

and lots three and four in section twenty-four (24,) T. 61, R. 12, in St. Louis County. He received but \$300, and the securities were Gonska foreclosed under the power in the mor.gage and bid in the land December 6, 1890, for \$450.38. Gonska on September 15, 1891, sold and assigned his certificate for \$425, to the defendant, the State Bank of Duluth. It had no knowledge or notice of the usury. Holmes on March 18, 1889, made a second note and a mortgage for \$200, on this land to A. R. McDonald for his accommodation and without consideration. On April 20, 1889, McDonald sold and assigned this note and mortgage for \$180, to This mortgage was also foreclosed, and the land sold August 18, 1890, to defendant for \$275.98. It had no notice when it bought this note and mortgage that they were merely accommedation paper, or that Holmes had received no consideration therefor. No redemption was made from either foreclosure sale. 15, 1890, Holmes conveyed a one-fourth interest in the land to The property is in the region of the iron mines, and is vacant and unoccupied. This action was brought to set aside and cancel the notes and mortgages and the foreclosures thereof and to quiet title to the land in plaintiffs, and was tried April 17, 1892. Defendant had judgment, and the plaintiffs appeal.

White, Reynolds & Schmidt, for appellants.

Cotton & Dibell, for respondent.

MITCHELL, J. The court finds that in March, 1889, plaintiff Holmes executed to one Gonska a promissory note for \$350, payable four months after date, with interest at 8 per cent. per annum, and, to secure the same, executed a mortgage upon certain real property; that this note and mortgage were usurious; that in December, 1890, Gonska foreclosed the mortgage by advertisement, and bid in the property for \$450, and received the usual sheriff's certificate, which was put on record; that in September, 1891, Gonska executed to defendant an assignment of this certificate, and a conveyance of his interest in the premises, for which defendant then paid him \$425; that at the time of receiving this assignment and deed, and paying the consideration therefor, the defendant had no notice or knowledge that the note and mortgage referred to were usurious, but bought and paid the consideration in good faith; that in March,

1889, plaintiff Holmes executed to one McDonald a negotiable promissory note for \$200, due in four months, with 8 per cent. interest. and, as security therefor, executed a second mortgage on the same premises; that he executed this note and mortgage for the accommodation of McDonald, and received no consideration therefor; that, before the maturity of this note, McDonald sold, transferred, and indorsed this note, and assigned the mortgage to defendant for \$180, then paid by it; that neither at the time of this purchase, nor at any time until after the foreclosure of this mortgage and the expiration of the time for redemption as hereinafter stated, did defendant have any notice or knowledge that this note was accommodation paper, or that plaintiff had received no consideration therefor; that in August, 1890, defendant foreclosed this mortgage by advertisement, and bid in the premises for the amount due thereon, viz. \$275.98; that the time for redemption from both of these mortgage sales has expired, and no redemption has been made from either.

All of these findings are, in our opinion, amply sustained by the evidence.

l'laintiffs bring this action to have both sales set aside and de lared void, on the ground that both mortgages were usurious and void. Defendant, on the other hand, claims to be the owner of the premises, and asks that it be so decreed, and that plaintiffs be adjudged to have no interest therein. Of course, if defendant has a good title under either sale, it must prevail. In our opinion, its title is good under both.

Taking up, first, the title under the Gonska mortgage, it cannot be questioned but that, if defendant itself had purchased at the foreclosure sale, it would have been protected as an innocent purchaser of the property, notwithstanding the usurious character of the mortgage on which it was being sold. *Jordan* v. *Humphrey*, 31 Minn. 495, (18 N. W. Rep. 450.)

And it can make no difference whether defendant bought at the sale, or subsequently from Gonska, who did buy at the sale. After the sale, and during the time for redemption, Gonska had a conveyable interest in the land. Lindley v. Crombie, 31 Minn. 232, (17 N. W. Rep. 372.) It was this interest in the land, and not the note and mortgage, which defendant bought from Gonska.

The same result is reached if we look to the McDonald mortgage. We are aware of the doctrine, of the courts of New York and some other states, that accommodation paper in the hands of the payer cannot be the subject of a sale; "that, to be the subject of a sale, the paper must have a pre-existing vitality;" that, an accommodation note having, in fact, as against the maker, no validity, and no legal inception, any one who buys it of the payee takes the precise place of the payee in respect to the defense of usury, although he purchases in ignorance of its true character, and supposing it to be, as it appears on its face, business paper, and given for value; and hence when such a note is sold, even to a bona fide purchaser, at a discount greater than the legal rate of interest, the transaction is usurious.

The same courts hold, as do all courts, that, if a party buys of the payee an accommodation note for its face, he can recover on it, and that the fact that the maker received no consideration will be no defense; also, that after paper has had an inception, and has become live business paper, a person may buy at any discount he can get it for, without rendering the transaction usurious. We confess that these distinctions are altogether too refined to commend themselves to our judgment. The doctrine of the New York courts virtually converts the purchase of a note into what the purchaser never intended or supposed it to be, viz. a loan of money, without which there can be no such thing as usury. Undoubtedly, if defendant had purchased this note knowing that it was accommodation paper, and hence had no vitality while still in the hands of the payee, the transaction would have amounted to a loan of money, upon the promise of the maker, Holmes, to pay back a sum that exceeded the rate of interest which defendant might legally exact, and hence would have been usurious. Or, to state the proposition generally, if no party, prior to the purchase, could have brought an action on the note, and the purchaser knew that fact when he bought it, there he must be taken to have loaned the money to the maker.

But the better rule, and the one as we think most consonant with reason and justice, is that if the holder, at the time he bought the paper, did not know that it was not already a valid subsisting security in the hands of the payee, there can be no intention of lending money, which is of the very essence of usury, and he may v.53m.-23

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recover upon it of the maker. He must assume that the apparent relation of the parties and character of the paper is the real one.

We think the question is already covered by the decision of this court in *Jackson v. Travis*, 42 Minn. 438, (44 N. W. Rep. 316,) which is not distinguishable in principle from the present case; and in this view of the law we are not without the support of authority elsewhere. See Daniel, Neg. Inst. § 752, and cases cited.

Judgment affirmed.

VANDERBURGH, J., absent, took no part. (Opinion published 55 N. W. Rep. 555.)

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STATE OF MINNESOTA vs. MARY CAMPBELL et al.

Argued May 16, 1893. Decided June 1, 1893.

Jurisdiction of Offenses Committed on Indian Reservation.

Unless otherwise provided by treaty with an Indian tribe, or by the act admitting the state into the Union, the criminal laws of the state. except so far as restricted by the authority of congress "to regulate commerce with the Indian tribes," extend to all crimes committed on an Indian reservation by persons other than tribal Indians.

Indians not Subject to State Jurisdiction.

But Indians, while preserving their tribal relations, and residing on a reservation set apart for them by the United States, are the wards of the general government, and as such the subject of federal authority, and the power to legislate for them is exclusively in congress. And for acts committed within the limits of the reservation, they are not subject to the criminal laws of the state.

Questions of law which arose January 29, 1892, on the trial of defendants, Mary Campbell and John Belonge, and were certified here by the District Court of Becker County. *Ira B. Mills*, J.

Defendants were indicted for the crime of adultery committed upon the White Earth Indian Reservation in Becker county, and were tried and found guilty. They moved in arrest of judgment, but were overruled. The defendant John Belonge was a Chippewa Indian living on the Reservation under the charge of an agent of the Federal government, and receiving an annuity. The defendant Mary Campbell was a half-breed, the child of a Chippewa Indian mother. She married James Campbell, a white man, in 1889, and lived with him as his wife outside the Reservation until the Spring of 1891, when she deserted him and went to her mother on the Reservation, and in the Fall went to live with Belonge. The questions certified here under 1878 G. S. ch. 117, § 11, were whether or not these persons were subject to the jurisdiction of the state courts.

The Attorney General and J. F. Irish, County Attorney, for the State.

No appearance for defendants.

MITCHELL, J. The defendants were indicted, tried and convicted, in the district court of Becker county, of the crime of adultery, committed within the limits of the White Earth reservation, in that county, which had been set apart by the United States for the residence of a tribe of Indians which still retained their tribal organization, and were under the care and supervision of the federal government. Belonge was an Indian belonging to this tribe, who retained his tribal relations, and lived on the reservation under the charge of a government agent, and as such received annuities from the United States. Campbell was a half-blood, being the child (legitimate, as we must presume) of a white father and an Indian mother, who did not sustain any tribal relations, but lived with her husband on a farm in Pine county, where the defendant Campbell was raised, and where she was married to a white man, with whom she resided in the same county until shortly before the commission of the alleged offense, when she left him, and went to the White Earth agency, where she has drawn one annuity from the United States as an Indian.

The question which the court below certifies to this court is, in brief, whether, under this state of facts, the defendants, or either of them, are subject to the jurisdiction of the criminal laws of this state.

This reservation was not excepted from the general jurisdiction of the laws of the state by the act admitting the state into the Union, and our attention has not been called to any existing treaty between the United States and this tribe of Indians excepting this reservation from the jurisdiction of the state. And we take it as well settled that, when not restricted by treaty with the Indian tribe, or by the act admitting a state into the Union, the jurisdiction of the state extends over the territorial limits of an Indian reservation so as to apply to all persons therein not tribal Indians under the care of the United States.

As it is evident from the facts stated that Campbell is not a "tribal Indian," we have no doubt that she is just as amenable to the criminal laws of the state for an offense committed on the reservation as she would have been had the offense been committed anywhere else in the state.

The case of the defendant Belonge is different.

It presents just this question: When not expressly restricted or prohibited by an existing treaty with the Indian tribes, or by the act admitting a state into the Union, do the criminal laws of the state (except so far as restricted by the constitutional authority of congress to regulate commerce with the Indian tribes) extend and apply to tribal Indians living under the charge of the general government on a reservation set apart by the United States for that purpose, so as to make them amenable to such laws for crimes committed within the territorial limits of the reservation?

The condition and status of the Indian tribes within the United States, their relations to the federal government, or to the states within whose territorial limits they happen to reside, are subjects which have given rise to much discussion in the courts, both state and federal, from a very early date. Their condition in relation to the United States is unlike that of any other two peoples. They are neither foreign nor independent nations, nor yet citizens of either the United States or of the states in which they reside.

Perhaps the best statement of their position is to be found in the opinions of Chief Justice Marshall in Cherokee Nation v. State of Georgia, 5 Pet. 1, and Worcester v. State of Georgia, 6 Pet. 515. Stated briefly it is, that as long as they retain their tribal relations, they are domestic, dependent communities, under the guardianship and protection of the general government.

While an Indian tribe resides in a territory, the ownership of the country and the right of exclusive sovereignty over it which exists in

the general government would, of itself, give congress the right to legislate for the Indians as well as all other persons residing therein.

And if this was the only source of such right, it would doubtless follow, as held in some cases, that, in the absence of a treaty or something in the act admitting the state into the Union restricting it, this jurisdiction would pass to the state, and thereafter the general government would have no power to legislate for the Indian tribes, except to "regulate commerce" with them. There are some decisions of state courts that go to this length, but, with one exception, they are all early decisions of southern states, within whose territorial limits the Cherokees and other southern tribes then resided, and were undoubtedly largely influenced by the intense local feeling existing on the subject at that time in those states. See State v. Tassels, Dudley, (Ga.) 229; State v. Foreman, 8 Yerg. 256; Caldwell v. State, 1 Stew. & P. 327. There are numerous cases holding that the state has jurisdiction of crimes committed by Indians who have abandoned their tribal relations, or by whites within the limits of a reservation, or by tribal Indians outside the limits of their reservation; but these are not in point. The same is perhaps true of cases where one of the original states had, prior to the formation of the general government, entered into treaty relations with a tribe of Indians within their boundaries, residing on a reservation set apart for them by the state itself.

There is no decision of the federal courts that a state can, even in the absence of a restriction in a treaty, or in the act admitting the state into the Union, extend its laws, either criminal or civil, over tribal Indians residing under the care of the general government upon a reservation set apart by it for that purpose.

It was held in Worcester v. State of Georgia, supra, that the state could not extend its laws, civil or criminal, over the Cherokee tribe.

It is true that the decision was substantially placed on the ground that this would be in conflict with the terms of the treaty between that tribe and the United States; but it must be noted that when that treaty was entered into the Indians were then living, not in a territory, but within an existing state of the Union.

Further, there is no authoritative decision of the federal courts that congress may not legislate in regard to crimes committed by or against tribal Indians under the charge of the general government, within the territorial limits of a state, even in the absence of the reservation of any such right in the act admitting the same into the Union. There are certain dicta of Justice McLean to that effect in United States v. Bailey, 1 McLean, 234; but the question has been conclusively settled the other way (at least, as to crimes committed within an Indian reservation) by the supreme court of the United States in United States v. Kagama, 118 U. S. 375, (6 Sup. Ct. Rep. 1109,) affirming the constitutionality of the act of March 3, 1885, (23 U. S. Stat. ch. 341, § 9.)

That act provides that "all Indians committing against the person or property of another Indian or other person any of the following crimes, viz. murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively.

And all such Indians committing any of the above crimes against the person of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, held in the same courts, and in the same manner, and subject to the same penalties, as all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The late Justice Miller, speaking for the court, after pointing out that the right of congress to legislate for Indians in territories could be maintained merely upon the ownership and exclusive sovereignty of the United States in and over the country, then proceeds to consider the second clause of the statute, which legislates with reference to Indians within a state. After conceding, what is almost self-evident, that the clause in the constitution giving congress the power to regulate commerce with Indians would not give it power to enact a system of criminal laws for Indians, having no relation to trade and intercourse with them, and suggesting that the statute does not interfere with the operation of state laws upon white people found within an Indian reservation, and that its effect is confined to acts of tribal Indians committed within the limits

of the reservation, he holds that this legislation is within the competency of congress, not because the right to enact it had been reserved by some treaty, or by the act admitting a state into the Union, but upon the broad ground that Indians, while preserving their tribal relations, residing on a reservation set apart for them by the United States, are the wards of the general government, and under its protection, and as such are the subject of federal authority, over which congress has the same power to legislate within the states as over any other subject of federal jurisdiction. And if they are thus under the control of congress, that control must be exclusive, for, as suggested in the case of the Kansas Indians, 5 Wall. 737, "from necessity there can be no divided authority." It would never do to have both the United States and the state legislating on the same subject.

By the act of 1885, presumably, congress has enumerated all the acts which in their judgment ought to be made crimes when committed by Indians, in view of their imperfect civilization. For the state to be allowed to supplement this by making every act a crime on their part which would be such if committed by a member of our more highly civilized society would be not only inappropriate, but also practically to arrogate the guardianship over these Indians which is exclusively vested in the general government. Moreover, it is very evident that the state never intended to attempt to extend its criminal laws over tribal Indians for acts committed within a reservation. 1878 G. S. ch. 25, § 1, and Penal Code, § 539.

The exception among the decisions of the state courts on the subject to which we have heretofore alluded is the very exhaustive and able opinion in *State* v. *Doxtater*, 47 Wis. 278, (2 N. W. Rep. 439.)

But with all due deference to that eminent court, it seems to us that they have not given due weight to the fact that the jurisdiction of the federal government over these Indian tribes rests, not upon the ownership of and sovereignty over the country in which they reside, but upon the fact that, as the wards of the general government, they are the subjects of federal authority within the states as well as within the territories,—a doctrine which the supreme court of the United States has developed and announced, in the case of *United States* v. Kagama, supra, much more distinctly than in

any deliverance extant when State v. Doxtater was under consideration, some fourteen years ago.

This cause is remanded to the court below, with directions to proceed to judgment on the verdict as against the defendant Campbell, but to discharge the defendant Belonge.

NOTE. See *United States* v. *Thomas*, 151 U. S. 577. [Reporter (Opinion published 55 N. W. Rep. 553.)

CHARLES W. CULVER et al. vs. Scott & Holston Lumber Co.

Argued May 8, 1893. Decided June 1, 1893.

Verdict Justified by the Evidence.

Evidence held to justify the verdict.

Memorandum to Refresh Recollection.

It is not necessary that the memorandum used by a witness to refresh his memory should have been made by himself. He may use one made by any one, if, after inspecting it, he can testify of the facts from his own recollection.

Entry in a Merchant's Account Books not Conclusive against Him.

The issue being whether certain goods were sold and delivered on the credit of defendants or of one C., defendants requested the court to charge the jury that the fact that the goods were charged on plaintiffs' books to C. was evidence that the credit was given to him, and not to defendants. *Held* not error to modify the request by instructing the jury that this fact was a circumstance in the case which should be considered by them in determining to whom the credit was given.

Appeal by defendant, Scott & Holston Lumber Co., a corporation, from a judgment of the District Court of St. Louis County, J. D. Ensign, J., entered September 9, 1892, in favor of plaintiffs for \$1,084.16.

The plaintiffs, Charles W. Culver and Frank E. Culver, were partners in business at Duluth. One Archibald Campbell had a contract with the defendant to cut and get out saw logs for it. He needed oats, hay and feed for his teams. He applied to plaintiffs March 12, 1892, to obtain these supplies. Charles W. Culver testified that on that day he went to Z. D. Scott, secretary and gen-

eral manager of the business of the corporation, and told him Campbell wanted oats, hay and feed to the value of about \$1,300. Scott said, "That is all right; let him have it, and we will pay it." Plaintiffs thereupon, on that day and subsequent days, delivered to Campbell a car load of oats, two car loads of hay and one car load of feed, all of the value of \$1,054; and as the goods were delivered, he and his clerks charged them on plaintiff's books to Campbell. On March 28, 1892, Campbell gave plaintiffs an order for this amount on the corporation, but Scott refused to accept the order, saying he had sent a scaler into the woods and expected him back in two or three days. Culver replied, "All right; I will call again." The order was never accepted or paid and plaintiffs brought this action against the corporation on its promise by Scott to pay for the goods. Defendant denied the promise and denied any knowledge of the amount or value of the goods. The issues were tried June 17, 1892, and the plaintiffs had a verdict for \$1,067.38. A case was made, settled, signed and filed, September 2, 1892. Judgment was entered September 9, 1892. On September 12, 1892, defendant served notice of a motion for a new trial. At the hearing on October 1, 1892, the trial court refused to consider the merits of the motion because it was not made until after judgment had been entered. Defendant then appealed from the judgment.

William B. Phelps, for appellant.

The verdict is contrary to the law and evidence. The produce was sold to Campbell and charged to him on the plaintiffs' books of account. It was an open running account, and this action is brought simply to recover a balance which the respondents were unable to collect from Campbell. No bill was ever presented to defendant. When plaintiffs wanted their pay they obtained an order from Campbell on defendant, which it refused to pay. There is no evidence in the case inconsistent with the defendant's contention, except the testimony of Charles W. Culver. On the other hand, all the evidence is inconsistent with his statement. The clear preponderance of testimony is against the verdict, and it should be set aside.

It is competent to read an entry made by a witness, of any fact material to the issue, if made at or near the time when the

fact occurred, and he can swear it was made correctly. He may use an entry made by himself, or any other person, or a copy of an entry, if on reading it, he can testify that he then recollects the fact to which the entry relates. 2 Rice, Ev., 744; 1 Greenl. Ev., § 437.

The first part of the foregoing statement relates to entries made by the witness himself; the last part to entries made by the witness or any other person. Culver was allowed to testify to the items of the account by reading them from the books of the partnership. He testified that the entries were in the handwriting of others as well as in his own, that he could not remember the items, times or prices, even after examining the items of the account. Being made by others as well as the witness, the entries could not, under the above rule, be read, unless the witness remembered the fact. This he repeatedly admitted he did not.

On the trial of the cause, the defendant asked that the jury be instructed that the fact that the produce was charged to Campbell was evidence that the credit was given to him and not to defendant. This instruction was refused and defendant excepted. A modified instruction was given. The jury were told that charging the produce to Campbell was a circumstance to be considered by the jury in determining to whom the credit was given. Winslow v. Dakota Lumber Co., 32 Minn. 237.

A new trial will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the parties. Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99; Smiths v. Shoemaker, 17 Wall. 630; Deery v. Cray, 5 Wall. 795; Moores v. National Bank, 104 U. S. 625; Gilmer v. Higley, 110 U. S. 47; Hoberg v. State, 3 Minn. 262 (Gil. 181); Kochler v. Cleary, 23 Minn. 325.

Draper, Davis & Hollister, for respondents.

Whether or not the evidence is sufficient to sustain the verdict must be passed upon by the trial court before it will be reviewed on appeal. This has not been done. Lund v. Anderson, 42 Minn. 201; Kelly v. Rogers, 21 Minn. 146; Byrne v. Minneapolis & S. L. Ry. Co., 29 Minn. 200; Jordan v. Humphrey, 31 Minn. 495; Barker v. Todd, 37 Minn. 370; Barringer v. Stoltz, 39 Minn. 63.

When the motion is made after judgment, it is within the discretion of the court to hear, or refuse to hear, the motion on the merits. Kimball v. Palmerlee, 29 Minn. 302; Collins v. Bowen, 45 Minn. 186; Sheldon v. Risedorph, 23 Minn. 518.

It is manifest that appellant was not prejudiced by the ruling of the court on the matter of using the books. The amount, value and delivery of the goods were fully proven by other evidence not objected to. Under this evidence, not objected to, nor contradicted, the court said to the jury in the charge, that there seemed to be no dispute as to the amount to be recovered, if anything. Huot v. McGovern, 27 Minn. 84; Beard v. First Nat. Bank, 41 Minn. 153. In this case the goods were charged on the books to Campbell, but the credit was given to defendant. In this respect the case is like Winslow v. Dakota Lumber Co., 32 Minn. 237; Maurin v. Fogelberg, 37 Minn. 23.

MITCHELL, J. This action was brought to recover for lumbermen's supplies which the plaintiffs allege they delivered, at the request of the defendant, and upon its promise to pay for the same, to one Campbell, who was engaged as a contractor in cutting logs for defendant.

1. The main issue on the trial was as to whether the goods were sold to Campbell on his own credit, or were delivered to him on the credit of the defendant, and upon its promise to pay therefor; and the first assignment of error is that the verdict, which was for the plaintiffs, was not justified by the evidence. It is so natural to look to the proprietor for payment of goods furnished to a contractor in case the latter proves to be irresponsible that observation has impressed us with the feeling that cases of this kind, even where the alleged promise is original, are practically as much within the mischiefs of the statute of frauds as where the promise is collateral, and hence that the evidence should be scanned quite carefully. while there is much in the manner in which the business was transacted that points to the theory that plaintiffs sold these goods, as they had previously sold others, to Campbell himself, although with the expectation that they would get their pay by orders from him on the defendant, yet, after a careful examination of the record, we are compelled to the conclusion that there was evidence from

which the jury were justified in finding that defendant expressly promised to pay for the goods; and, if it did, we think the evidence was plenary that the promise was an original, and not a collateral, one, and hence not within the statute of frauds.

We think this court could not disturb the verdict on the ground of the insufficiency of the evidence.

2. While the issue referred to was the principal one, yet the defendant, by its denial of knowledge or information sufficient to form a belief on the subject, put the plaintiffs to their proof of the amount and value of goods delivered to Campbell; and it is this issue to which the second assignment of error relates, to wit, that "the court erred in permitting the witness Charles Culver [one of the plaintiffs] to testify to the items of the account sued on, by reading the same from the books of the plaintiffs." This assignment does not refer to any particular ruling, either by folio or otherwise; and upon reference to the record we find that the testimony of the witness on the subject of the account extends through seven pages of the paper book, consisting of very scrambled and desultory examination and cross-examination, and including several different rulings of the court. The assignment of error is certainly not in compliance with the spirit of the rules of court. But, waiving this, we fail to find in the record any exception which raises the point probably intended to be suggested by the assignment of error. For some reason, probably because they did not consider it very important, counsel conducted the trial of this issue, both in the introduction of testimony and in the interposition of objections, rather carelessly, and without keeping in mind the exact rules of evidence applicable to the case. Counsel for the plaintiffs did not introduce their books of account, and laid no foundation for doing so, but proceeded to examine the witness Charles Culver as to the items of the account from his memory of the transactions, refreshed by reference to a written memorandum. The first memorandum used for that purpose seems to have been copied from plaintiffs' books, but, finally, the books themselves were brought into court, and the witness began to use his ledger to re'resh his To this defendant's counsel objected, for the reasons memory. "that the books themselves were the best evidence," and "that the proper foundation had not been laid for the question," viz. what

goods were delivered after the date of the alleged promise of de-This objection having been sustained by the fendant to pay? court, plaintiffs' counsel then resorted to the use of the plaintiffs' daybook, as a memorandum to refresh the witness' memory. Then followed considerable preliminary examination and cross-examination of the witness, from which it appeared that the daybook was plaintiffs' book of original entries; that these entries were made at or about the dates of the transactions, but were not all made by the witness, a great many of them having been made by different persons employed by plaintiffs in their office. Plaintiffs' counsel then renewed his question, when defendant's counsel interposed an objection "to the witness testifying to any transaction where he did not make the entry himself." The exception to the ruling of the court overruling this objection is the only tangible exception possibly covered by the assignment of error. The preliminary examination of the witness left it in a good deal of doubt as to how far, and as to what items, he had a personal recollection after refreshing his memory by reference to the entries in the daybook; and, if the objection of counsel had gone to that point, there might have been some merit in it, for the rule is that if, after examination of the memorandum, the memory of the witness is not refreshed, and he has no recollection of the transaction, and no remembrance of having recognized the memorandum as true, his testimony, so far as founded on the writing, would be mere hearsay. But this was not the point of counsel's objection, which was merely to the effect that the witness could only use, for the purpose of refreshing his memory, entries made by himself personally. In this the counsel misapprehended the rule. It is not necessary that the writing should have been made by the witness himself. He may use an entry made by any one if, after inspecting it, he can speak of the facts from his own recollection. It is not the writing, but the recollection of the witness, that is the evidence in the case; and it is not important who made the entry, providing it, in fact, revives or refreshes the memory. 1 Greenl. Ev. § 436; 2 Rice, Ev. 744, 747.

3. The defendant requested the court to instruct the jury that "the fact that on the plaintiffs' books the articles are charged to Campbell is evidence that the credit was given to him, and not to defendant." This the court modified, and gave as follows: "The

fact that on the plaintiffs' books the articles are charged to Campbell is a circumstance in the case that should be considered by the jury in determining to whom the credit was given." There was no error in this modification. A lay jury are liable to confound "evidence" and "proof," and hence the request in the form asked for might have misled them; and it was very likely for that reason that the court made the change in its language. But it seems to us that the charge, as given, gave the defendant all that it was entitled to. The jury must have understood from it that the fact referred to was a piece of evidence which they should consider, and it is hardly to be supposed that they were so obtuse as not to understand in whose favor it weighed. Moreover, other parts of the court's charge refer to the same evidence in such a way that the jury could not have failed to understand the matter.

Judgment affirmed.

VANDERBURGH, J., absent, took no part. (Opinion published 55 N. W. Rep. 552.)

ALFRED SHRIMPTON & Sons, (Limited,) vs. F. W. PHILBRICK.

Argued by appellant, submitted on brief by respondent, May 25, 1893. Decided June 1, 1898.

The Seller's Fraud is not Excused by the Buyer's Lack of Business Prudence.

Where one of the parties to a written contract was induced to execute it by the intentional fraud of the other party, the defrauded party may defend against its enforcement, notwithstanding that he was lacking in ordinary business prudence in executing it. Following former decisions.

Verdict Justified by the Evidence.

Evidence held sufficient to justify the verdict.

Irrelevant Evidence not Prejudicial.

Held, also, that there was no prejudicial error in admitting evidence of certain collateral facts, for the reason that, even if not relevant, substantially the same evidence had been already admitted without objection.

Appeal by plaintiff, Alfred Shrimpton & Sons, (Limited), a corporation, from an order of the District Court of Redwood County, B. F. Webber, J., made January 14, 1893, denying its motion for a new trial.

The defendant, F. W. Philbrick, on September 23, 1891, gave plaintiff's traveling salesman an order for two great gross papers of pins, 200 in a paper, at two and a fourth cents per paper, \$77.76, and for two great gross papers, 360 in a paper, at three and three-fourths cents per paper, \$129.60, payable in thirty days; one per cent. discount if paid in ten days. The pins were to be made at the factory at Redditch, England, and shipped to plaintiff's American Depot, 273 Church Street, New York, and from there to defendant at Redwood Falls. The goods were shipped from New York November 21, 1891. Defendant refused to receive them and on December 3, 1891, wrote plaintiff at New York that the order was for "four gross," not "great gross," and that if the printed word "great" in the order had not been erased, it was either an oversight or an intentional fraud on the part of plaintiff's agent.

The goods remained in the depot at Redwood Falls, and on March 7, 1892, plaintiff brought this action to recover the price, \$207.36. The issues were tried November 11, 1892. Defendant had a verdict.

L. G. Davis and J. A. Eckstein, for appellant.

Defendant does not set up inability to read or write, nor lack of capacity as a business man. He does not even allege a lack of opportunity to read the order, or that the printing of the objectionable word "great" was in fine type. The only fraud alleged is that plaintiff's agent represented to him that he had written out the orders just as agreed. Such a showing constitutes no defense to the action. Hazard v. Griswold, 21 Fed. Rep. 178; Taylor v. Fleckenstein, 30 Fed. Rep. 99; Seeright v. Fletcher, 6 Blackf. 381; Hawkins v. Hawkins, 50 Cal. 558; Maine Mutual Marine Ins. Co. v. Hodgkins, 66 Me. 109; Keller v. Orr, 106 Ind. 406; Fayette Co. Sav. Bank v. Steffes, 54 Iowa, 214; McCormack v. Molburg, 43 Iowa, 561; Gulliher v. Chicago, R. I. & P. Ry. Co., 59 Iowa, 416; Wallace v. Chicago, St. P., M. & O. Ry. Co., 67 Iowa, 547; Hill v. Syracuse, B. & N. Y. R. Co., 73 N. Y. 351; Germania Fire Ins. Co.

v. Memphis & C. R. Co., 72 N. Y. 90; Minneapolis & St. L. Ry. Co. v. Cox, 76 Iowa, 306.

It is inexpedient, upon grounds of public policy, that a solemn instrument executed for the purpose of embodying and evidencing the agreement of the parties, should be set aside upon the ground of fraud, unless the proof be clear and strong. *McCall v. Bushnell*, 41 Minn. 37.

M. M. Madigan, for respondent.

MITCHELL, J. 1. This action was brought to recover the purchase price of certain merchandise, the principal item of which was four great gross of papers of pins, which plaintiffs claim defendant ordered, and which they shipped to him, but which he refused to accept, on the ground that he had ordered only four gross.

Defendant's written order read "four great gross," but he alleged that the actual contract, as orally agreed on between him and plaintiffs' agent, was for only four gross, but that the agent, who voluntarily assumed to reduce the contract to writing, with intent to cheat and defraud the defendant, wrote it for "four great gross," and then falsely represented to him that it was written in accordance with the actual agreement; and that, relying upon these false and fraudulent statements, the defendant signed the order without reading it, believing that it was for four gross, as they had agreed.

If the defendant established these allegations, it would be a good defense, notwithstanding that he might have been negligent in relying on the representations of plaintiffs' agent and in signing the order without reading it. C. Aultman & Co. v. O'son. 34 Minn. 450, (26 N. W. Rep. 451;) Maxfield v. Schwartz, 45 Minn. 150, (47 N. W. Rep. 448;) Erickson v. Fisher, 51 Minn. 300, (53 N. W. Rep. 638.)

Of course, as the court correctly instructed the jury, the mere fact that the defendant signed the order, without reading it, for a greater quantity of goods than he intended to purchase, would constitute no defense. The defense, if defense there was, consisted in the fraud practiced by the plaintiffs' agent in procuring the execution of a written contract different in terms from those in fact agreed on.

- 2. While, like the learned trial judge, we do not think that there was "an overwhelming preponderance of evidence in favor of the defendant," and while we recognize the danger in allowing the written contracts of parties to be set aside on oral testimony, yet, after examining the record, we think that the evidence fairly made a case for the jury, and that this court would not be warranted in disturbing the verdict.
- 3. Upon the trial the main issue was as to the actual agreement of the parties, and the circumstances under which the written order was executed. The transaction was had between defendant and plaintiffs' traveling salesman, at the store of the former. It appeared that defendant was a retail merchant in the village of Sleepy Eye, and presumably acquainted with the demands of his trade; also that plaintiffs' agent had been in their employment for some five years soliciting orders for this line of goods from the trade, and hence presumably acquainted with the usual size of orders given by country retail dealers. The agent had testified positively that all the negotiations leading up to the contract were expressly and minutely conducted with reference to "great gross;" that he gave defendant a price list, in which the prices were given by the great gross; that defendant figured on this list; that he offered defendant special prices in consideration of his taking four great gross; that defendant accepted this offer; and that, after the order was put in writing, it was read over by, and fully explained to, him before he signed it.

Defendant, on the other hand, had testified positively and explicitly that all the negotiations were with reference to so many gross, and that "great gross" was never mentioned or alluded to, and that, after asking his clerk whether they could stand \$20 (the approximate cost of four gross) for pins, he agreed to take four gross; that the agent then drew up the order, and, upon his representation that it was exactly as they had agreed, the defendant signed it without reading it.

Under this state of the evidence, the defendant was allowed to testify without objection that any merchant doing his business would not sell four great gross of papers of pins in ten years. He further testified, but under plaintiffs' objection, that it would take him two or three years to sell four gross.

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My own opinion, in which Justice Collins concurs, is that, under the circumstances, and in view of the sharp conflict of testimony, all this evidence was admissible, as having a natural and logical tendency to prove that defendant's statement was the more reasonable and probable; and that, under the situation of the case, it was not seriously subject to the evils at which the general rule against the admissibility of evidence of collateral facts is aimed.

The other justices are of the opinion that none of the evidence was relevant, but that, the first, and perhaps most cogent, part of it having been admitted without objection, there was no prejudicial error in admitting the last, which was, in effect, but a repetition of the first in another form.

Order affirmed.

Vanderburgh, J., absent, took no part.

(Opinion published 55 N. W. Rep. 551.)

ELIZABETH L. WILLIS vs. St. Paul Sanitation Co. et al.

Submitted on briefs May 11, 1893. Decided June 1, 1893.

Ratification of Agent's Contract by Accepting the Proceeds.

If a corporation retains and uses money borrowed for it by its officer in excess of his authority, it ratifies the transaction, and is liable.

Appeal by defendant, E. L. Mabon, from an order of the District Court of Ramsey County, *Hascal R. Brill*, J., made October 28, 1892, denying his motion for a new trial.

The plaintiff, Elizabeth L. Willis, loaned \$2,684.48 to the defendant, St. Paul Sanitation Company, a corporation. She brought this action against the corporation and its stockholders to recover \$1,073.08, the unpaid balance of the money and interest.

James H. Foote, for appellant.

J. C. & W. H. Michael, for respondents.

MITCHELL, J. This appeal presents no question of any merit.

The action was to recover money loaned to the defendant corporation, and to enforce the individual liability of the defendant stockholders therefor. That the money was loaned to the corporation by either the plaintiff or her husband is not in dispute under the evidence. It was paid into the company's treasury by the husband as the plaintiff's money, and at his direction credited to her on its books. He has never made any claim to it, but, on the contrary, insisted on the trial that the money belonged to his wife; and it is no concern of the company to whom it in fact originally belonged.

Neither is it material whether the officer who procured the loan had authority to do so or not. By retaining the money and appropriating it to its own use, the company has ratified the transaction.

It is equally unimportant that the inducement to plaintiff to make the loan might have been the provisions of the contract between her husband and certain stockholders and officers of the company, looking to a transfer to him of a controlling interest in its stock, etc.

Order affirmed.

Vanderburgh, J., absent, took no part. (Opinion published 55 N. W. Rep. 550.)

ASHLEY C. MORRILL vs. LITTLE FALLS MANUFACTURING Co. et al.

Argued May 12, 1898. Decided June 1, 1898.

Notice to Stockholders of Corporate Meetings.

If the charter or by-laws of a corporation fix the time and place at which regular meetings shall be held, this is itself sufficient notice to stockholders, and no further notice is necessary.

The Stockholders who Attend, whether One or More, Constitute a Quorum.

Unless otherwise provided in the charter or by-laws of an incorporation, such of the stockholders as actually assemble at a properly convened meeting, whether one or more, and although a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business. The distinction in that regard pointed out between a corporate act to be done by a select and definite body, as by a board of directors or trustees, and one to be performed by the constituent members of the corporation.



Limitation of Actions for Fraud.

Where a party seeks relief on the ground of fraud more than six years after the commission of the act constituting the alleged fraud, he must allege and prove that the facts were not discovered until within six years before the commencement of the action.

Pleading the Facts to Obtain Relief on the Ground of Fraud.

If a conveyance was in fact the deed of a corporation, but voidable because of fraud, if stockholders desire to have it set aside on that ground, they must allege the facts constituting the alleged fraud, and ask the appropriate relief; they cannot prove the fraud under a mere denial of the execution of the deed by the corporation.

Who Entitled to Vote on Stock at Meetings of Stockholders.

Where stock is transferable only on the books of the corporation, the person in whose name the stock stands on such books is entitled to vote it, and the books of the company are conclusive upon the question as to who is entitled to vote stock legally issued.

Certain findings held not justified by the evidence.

Appeal by defendants, Little Falls Manufacturing Company, Charles A. Bullen and Charles F. Mayhew, from a judgment of the District Court of Morrison County, D. B. Searle, J., entered June 11, 1892, decreeing that neither of them had any title to, or estate in, a large amount of lands and town lots in and near Little Falls in said county.

The plaintiff, Ashley C. Morrill, brought this action, November 15, 1888, under 1878 G. S. ch. 75, § 2, and Ex. Sess. Laws 1881, ch. 81, against the defendants above named, and others, and also all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint. A notice of the pendency of the action was filed for record and published with the summons. An answer was filed in behalf of the three defendants above named, denying plaintiff's title, but asserting no title in the defendants, or in any of them. On August 24, 1889, the defendants Bullen and Mayhew were permitted by order of the court to serve an amended answer. The plaintiff replied and afterwards moved for judgment on the pleadings. The court granted the motion, judgment was entered and defendants appealed. That judgment was reversed, 46 Minn. 260, and the issues were tried October 27, 1891. Findings of fact and conclusions of law were made and filed April 23, 1892, on which judgment was entered for

the plaintiff June 11, 1892, decreeing that he was the owner in fee of the real estate described in the complaint, and that defendants had not, nor had either or any of them, any right, title or interest in, or lien upon, the property or any of it, and that neither Bullen nor Mayhew was entitled to answer or defend for the corporation, and that they by their acts had estopped themselves from in any manner questioning the plaintiff's title. They made and settled a case containing exceptions and moved for a new trial, which was denied November 5, 1892.

The Little Falls Manufacturing Company was a corporation created by Act of the Legislature of the Territory of Minnesota, Laws 1856, ch. 138, p. 221. It was empowered to buy, hold and sell real estate, and to construct a dam across the Mississippi River at Little Falls, create a water-power, build mills, and carry on manufacturing and other business. Its capital stock was \$100,000, divided into shares of \$100 each. All the capital was taken and fully paid in. It constructed the dam, built a mill, acquired the title to all the real estate in question in this action, and made extensive improvements. Reverses followed. The dam and mill were swept away in a flood. The panic of 1857, and the war of 1861, enhanced the difficulties. The organization of the corporation was kept up until 1864, when both the president and secretary died, and from that time until 1881, no effort was made to elect officers or hold meetings. About this time the property advanced rapidly in value and the plaintiff took measures to acquire title to it. He procured one Samuel Thayer who owned, or held proxies for, one hundred and fifty shares of the stock, to go on the day provided by the by-laws for holding the annual meeting of stockholders, and to alone elect a board of directors, to each of whom he transferred one share of his stock. They elected him president and one Reuben Tomlinson, secretary, and they conveyed the property to William Eustis, and Eustis conveyed it to Thayer, and Thayer conveyed an undivided half to the plaintiff. Afterwards in January, 1883, Thaver quitclaimed the whole to the plaintiff and assigned to him his stock, and he was made president in Thayer's stead. These deeds were not recorded, and other stockholders appeared and attempted to gain possession of the corporation, and its property, now worth many thousands of dollars. This contest between the

two factions is not yet closed. Other and subsequent facts are stated in the opinion. The discussion here was largely upon the facts.

W. F. Bailey and F. W. Lyons, for appellants. Taylor, Calhoun & Rhodes, for respondent.

MITCHELL, J. This was the ordinary statutory action to determine adverse claims to real property, the plaintiff alleging generally that he was the owner in fee and in possession, and that the defendants claimed some interest adverse to him. Bullen and Mayhew, as stockholders, were admitted to defend on behalf of the defendant corporation, for reasons assigned when the case was here on a former appeal. 46 Minn. 260, (48 N. W. Rep. 1124.)

Their answer, in brief, is that the corporation is the owner of property in controversy; that the interest claimed by plaintiff is by virtue of a deed purporting to have been executed by the corporation to one Eustis on July 11, 1882, and recorded June 18, 1883, which deed they attack on two grounds: (1) That the party by whom it was executed was not an officer of the corporation, and had no authority to execute conveyances in its behalf; and (2) that it was executed without consideration, for the purpose of defrauding the corporation out of the property. On the first ground, if established, the deed would, of course, be absolutely void; on the second ground, it would be voidable only. Upon the trial it was admitted that all the property in dispute, except one tract called the "Hayes Land," formerly belonged to the corporation; hence the plaintiff had to deraign his title from that source. For that purpose, in addition to the deed or deeds executed in 1882, (and which it appears did not cover all the property,) the plaintiff introduced in evidence: (1) Sundry conveyances purporting to have been executed in 1886 and 1887, by or on behalf of the corporation, to various parties to whose rights he had succeeded by mesne conveyance; (2) the records of various sales on execution to one Herrick, (to whose rights he had also succeeded,) on judgments against the defendant corporation, and which have been the subject of much litigation in this court. See Herrick v. Ammerman, 32 Minn. 544, (21 N. W. Rep. 836;) Herrick v. Churchill, 35 Minn. 318, (29 N. W. Rep. 129;) Herrick v. Morrill, 37 Minn. 250, (33 N. W. Rep. 849.) The attorneys have stipulated into this case the record in the case last cited, but we do not feel called upon to wade through it, to ascertain which of these execution sales were valid, or what part of the property they covered, even if the record contained (which is doubtful) the data from which these facts could be ascertained.

All we deem necessary to consider, for the purpose of a determination of this appeal, are the conveyances purporting to have been made by the corporation to plaintiff's grantors in 1882 and in 1886 and 1887, upon which alone the court below seems to have based its decision in favor of the plaintiff.

To a full understanding of the case, it is necessary to refer briefly to the history of the Little Falls Manufacturing Company. It was a corporation organized in 1856, under a special charter, (Laws 1856, ch. 138,) with power to adopt by-laws determining the amount of its capital stock, and providing for the transfer thereof. It was made the duty of the president, under the authority of the by-laws, or under the direction of a majority of the directors, to execute conveyances, etc., in behalf of the corporation. The corporation adopted by-laws, which provided, among other things, that the shares of stock should be transferable only on the books of the compauy at Little Falls, in person or by attorney, legally authorized, in presence of the president or secretary, on surrender of the certificate of stock, and that the secretary should certify on the certificate that the transfer had been made. They also provided that the directors should be elected at the office of the company at Little Falls, either in person or by proxy, on the second Monday of August in each year, all votes to be given in proportion to the amount of stock. There was nothing in the by-laws requiring any notice to be given of this annual meeting. The company acquired a considerable amount of real estate in or near what is now Little Falls, and continued in business, or at least kept up its organization, until 1864, by which time it seems to have become hopelessly insolvent, its business wholly abandoned, and the organization practically defunct, without any effort on part of any of the stockholders to revive it, or to look after its property, until 1881,-a period of about seventeen years. In the mean time plaintiff, who as yet had no connection with the company, had been attempting to acquire title to its lands through tax titles, and through the Herrick execution sales. Finally, in 1881, and at the suggestion of plaintiff, one Thayer, for himself and as proxy for certain other stockholders, went to Little Falls, on the second Monday of August. (the time and place fixed by the by-laws for the annual meeting.) and cast the votes of himself and those for whom he was proxy for a board of directors. Theyer was the only person present at the meeting. The same thing was done on the second Monday of August, 1882, by one Tomlinson, who was the only stockholder who During these years Thayer acted as presiwas personally present. dent of the company, and, as such, in June, 1882, executed in its behalf the deeds to Eustis already referred to. In June, 1883, a special meeting was called, when, for the first time, the appellants Bullen and Mayhew appeared on the scene; but, as the regularity of this meeting is not here involved, it may be passed over without consideration. At the annual meeting on the second Monday of August, 1883, a large number of stockholders were present, either in person or by proxy, and were divided into two parties, respectively known as the "Morrill Faction" and the "Bullen Faction," each desirous of obtaining control of the corporate organization. Disputes having arisen among them as to the right to vote certain shares of stock, the meeting virtually divided into two, each assuming to hold an election, and each declaring a different set of men elected as directors. These two rival organizations have been continued ever since, each claiming to represent the cor-It was the president elected by the "Morrill" directors who executed the deeds of 1886 and 1887, under which plaintiff in part claims title. These deeds were executed and recorded before the appellants interposed their answer, but they entirely ignored them, and asked no relief as to them.

As affecting the validity of the deeds executed in 1882, in behalf of the corporation, by Thayer as president, the appellants assail the finding of the court as to the election of directors in August, 1881. The grounds of objection are: First, that no notice was given of the meeting; and, second, that it required a majority of the shares of stock to constitute a quorum to hold a meeting, or, in any event, that one person could not hold a meeting; that at least two persons are necessary to constitute a corporate meeting.

As to the first point, all that is necessary to say is that the bylaws fixed the time and place of holding the meeting, and neither the charter nor the by-laws required any notice to be given. Under such circumstances, the rule is that the by-laws themselves are sufficient notice to all the stockholders, and no further notice is necessary. 1 Mor. Priv. Corp. § 479.

The second objection is equally untenable. Where the charter and by laws of a corporation are silent on the subject, the common law rule is that such of the shareholders as actually assemble at a properly convened meeting, although a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business, and may express the corporate will, and the body will be bound by their acts. Cook, Stock & S. §§ 607, 623; 2 Kent, Comm. 293; Mor. Priv. Corp. § 476; Craig v. First Presbyterian Church, 88 Pa. St. 42; Rex v. Varlo, Cowp. 248; Columbia Bottom Levee Co. v. Meier, 39 Mo. 53; Ex parte Willcocks, 7 Cow. 402; Field v. Field, 9 Wend. 395.

The contention of appellants that this rule applies only to such organizations as towns, churches, and the like, and not to stock corporations, finds no support either in reason or authority. The correct distinction is between a corporate act to be done by a select body, of a definite number, as, for example, a board of directors or trustees, and one to be performed by the constituent members of the corporation. In the latter case a majority of those who appear may act. This distinction is clearly made in several of the cases above cited, and also in the leading case of Rex v. Bellringer, 4 Term R. 810. As was said by Lord Mansfield in Rex v. Varlo, supra: "It is in the nature of all corporations to do corporate acts; and, when the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet on the charter days, and the major part who are present to do the act. But, when there is a select body, it is a different thing, for then it is a special appointment." And, this being so, it is immaterial whether the number present is only one or more than one. neld in Sharpe v. Dawes, 46 Law J. Q. B. 104, followed reluctantly in another case, that one person cannot constitute a quorum; that at least two persons are necessary to hold a corporate meeting; but this decision is based upon a narrow lexicographical definition of the word "meeting," as the coming together of two or more persons,
—a reason that does not commend itself to our judgment.

Therefore, in our opinion, the court was justified in holding that the election of directors in 1881 was regular; and it follows that the deeds executed in 1882 by Thayer, the president elected by them, were the deeds of the corporation.

If, however, they were made in fraud of the rights of stockholders, they were voidable at their suit seasonably instituted. Such action would have to be commenced within six years after the discovery by the aggrieved party of the facts constituting the fraud. 1878 G. S. ch. 66, § 6, subd. 6. But, if the acts constituting the fraud were committed more than six years before the commencement of the suit, the party must allege and prove that these facts were not discovered until within six years. Humphrey v. Carpenter, 39 Minn. 115, (39 N. W. Rep. 67.) The same rule would apply where, as in this case, the defendant, in his answer, seeks the affirmative relief of having the voidable instrument set aside on the ground of fraud. In this case, although more than six years had elapsed, there is not a word of evidence as to when appellants discovered the facts. For anything that appears, they, and every other stockholder, might have had full knowledge of all the facts connected with the transaction the very day on which the deeds were executed. The result is that the appellants were not entitled to any relief as to the deeds of 1882.

2. We now come to the deeds of 1886 and 1887. As already stated, the answer is silent as to these deeds. If they were the deeds of the corporation, but voidable on the ground of fraud, it was incumbent on appellants, if they desired to have them set aside on that ground, to allege the facts constituting the fraud, and ask for the appropriate relief. Not having done so, the only question open to them is whether or not the conveyances were the deeds of the corporation. This depends on whether the person who executed them was president of the corporation,—a question which, in turn, depends on who were elected directors at the annual meeting in August, 1883. There is no question of "de facto," as distinguished from "de jure," officers involved. Neither set of directors was in possession of the office more than the other. In fact, there appears to have been nothing to take possession of. The "Bullen" directors

never performed any corporate act, and the "Morrill" directors never performed any, except to execute these deeds; and the possession of such fragments of corporate records as were still in existence seems to have been pretty equally divided between them. Hence the matter reduces itself down to the simple question, which set were the de jure directors? The evidence on this point is extremely vague and unsatisfactory. Each party relies mainly upon the record of the annual meeting made by itself. But this is merely working in a circle. If it was once established that one party was regular, and represented the corporation, then, of course, the records kept by it would be evidence of the corporate action. But it has to be first determined which party represented the corporation, and on that question neither party could manufacture evidence for itself by making up a pretended corporate record. As might be expected in the case of a corporation organized at so early a date, and which had been practically defunct for so many years, the evidence as to how much stock was out, and who owned it, is exceedingly meager, as well as obscure.

About the only tangible evidence on the subject which we can find is "Book No. 5," introduced by the defendants, which appears to have been the company's record of stock issued, and when and to whom issued or transferred. It appears that, according to the by-laws, stock was transferable only on the books of the corporation. This provision is for the protection and benefit of the corporation, so that it may know with whom to deal as stockholders, and who have a right to vote as such; and, as against the corporation, a transfer of stock is ineffectual until made on the books of the com-The general and better rule is that the person in whose name stock stands on the books is entitled to vote it; that the books of the company are conclusive upon the inspectors as to who are entitled to vote; and that neither inspectors nor stockholders can successfully dispute the right of any one to vote who appears by the company's books to be the holder of stock legally issued. Upon any other rule it would never be known who were entitled to vote until the courts had settled the dispute. A person who has purchased stock, and who desires to be recognized as a stockholder, for the purpose of voting, must secure such a standing by having the transfer recorded upon the books. If the transfer is not duly

made upon request, he has his remedy, to compel it to be made. Cook, Stocks & S. § 611; People v. Robinson, 64 Cal. 373, (1 Pac. Rep. 156;) Downing v. Potts, 23 N. J. Law, 66; State v. Ferris, 42 Conn. 560; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 80; Bank of Commerce's Appeal, 73 Pa. St. 59; Hoppin v. Buffum, 9 R. I. 513; In re St. Lawrence Steamboat Co., 44 N. J. Law, 529.

Upon examination of the record in this case, we fail to find any competent evidence that the Morrill directors received a majority of the legal votes cast at the meeting of 1883. Out of 311 votes claimed to have been cast for them, 297 were cast by Morrill himself, but there is no evidence that any such amount of stock stood in his name on the stock or transfer books of the company. The main dispute seems to have been as to who was entitled to vote the socalled "Babbett Stock," but none of this stock had been transferred to Morrill on the books of the company, and we have been unable to discover any evidence that he was even the equitable owner of The burden was on plaintiff to prove the election of the officers through whose deeds he claims title, and this he has failed to do. This goes to the validity of the deeds of 1886 and 1887, upon which, in part at least, the court below based its decision in favor of plaintiff. We are not able to determine from the record as to how much or to what portions of the property in controversy plaintiff's title depends on these deeds.

Judgment reversed, and new trial ordered.

Vanderburgh, J., absent, took no part.

(Opinion published 55 N. W. Rep. 547.)

Application for reargument denied June 16, 1893.

MINNEAPOLIS TIMES Co. vs. CHARLES A. NIMOCKS.

Argued May 19, 1898. Decided June 1, 1898.

Secondary Evidence Properly Received.

Held, that secondary evidence of the contents of a written notice served on defendant was properly admitted.

Notice of Meeting Waived if All Attend.

The fact that notice of a special meeting of a board of directors was not given as provided by the by-laws of a corporation is immaterial if all the members of the board were in fact present and participated in the proceedings.

Correcting Inaccuracy in the Charge to a Jury.

Certain inaccuracies in the charge held to have been corrected by subsequent instructions to the jury.

Appeal by defendant, Charles A. Nimocks, from an order of the District Court of Hennepin County, *Henry G. Hicks*, J., made November 19, 1892, denying his motion for a new trial.

The plaintiff, the Minneapolis Times Company, is a corporation organized December 12, 1890, under 1878 G. S. ch. 34, title 2, for the purpose of publishing a newspaper and carrying on a printing and publishing business at Minneapolis, with a capital stock of \$200,000 in shares of \$100 each, to be paid in at such times and in such installments as the board of directors might determine. On November 27, 1891, defendant owned and held two hundred shares on each of which installments had been called and paid to the amount of \$45.50. At a meeting of the board of directors held on that day, which all attended, a further call was made of six per cent. of each share, payable one-half on November 28, and the other half on December 15, 1891. Notice of this call was given the next day by mail to all the stockholders. Defendant failed to pay, and this action was brought May 21, 1892, to recover the amount and interest.

Defendant answered that his stock was fully paid-up stock and not liable to assessments; that the meeting of the board of directors on November 27, 1891, was illegally called and held; that notice of the call was not given him. The issues were tried October 10, 1892, and a verdict rendered for plaintiff for \$1,257.05.

Geo. F. Edwards, for appellant.

The meeting at which the assessment was made was a special meeting; the by-laws provide a method in which special meetings of plaintiff's board of directors should be called. There is no testimony whatever to show that the gentlemen mentioned in the record of the meeting were directors, and there was no showing of the manner in which the meeting was called.

The court erred in allowing proof of the contents of the notice of the assessment, claimed to have been sent to defendant. The secretary testified that there might be in plaintiff's office, a copy of the notice sent to the defendant, that he had made no search for any such copy. The witness was then permitted to testify from his recollection, as to the contents of the notice, without any showing that the original had been lost or destroyed, or of plaintiffs inability to produce a copy of the notice or the original notice. Nichols v. Howe, 43 Minn. 181; Nelson v. Central Land Co., 35 Minn. 408; Groff v. Ramsey, 19 Minn. 44, (Gil. 24;) Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

Defendant was entitled to actual notice of the assessment; mailing of a notice is not sufficient, and mere information or knowledge that an assessment had been made, is not a sufficient notice under the statute. 1878 G. S. ch. 34, § 130. The by-laws of plaintiff are silent on that subject. The meeting at which the assessment was made did not prescribe or direct any manner of notice. Burhans v. Corey, 17 Mich. 282; Castner v. Farmers Mut. Ins. Co., 50 Mich. 273; New Jersey Midland Ry. Co. v. Strait, 35 N. J. Law, 323; Hughes v. Antietam Mfg. Co., 34 Md. 316; Rutland & B. R. Co. v. Thrall, 35 Vt. 536; Wachtel v. Noah Widows & O. B. Soc., 84 N. Y. 28; Lewey's Island R. Co. v. Bolton, 48 Me. 451; Essex Bridge Co. v. Tuttle, 2 Vt. 393; M. Corkle v. Texas Ben. Ass'n, 71 Tex. 149.

Cobb & Wheelwright, for respondent.

The plaintiff introduced in evidence its by-laws in force at the time the call was made. It then introduced the records of the meeting at which the assessment and call were made. The secretary of the plaintiff identified the records of this meeting and testified that everything therein mentioned actually transpired and oc-

curred at the meeting. All the directors of the company were present. The law presumes that the notice of meeting required by the by-laws had been regularly given, and that all necessary formalities had been complied with. Cook, Stock & S. (2d Ed.) § 600; 1 Mor. Priv. Corp. § 532; 1 Beach, Priv. Corp. §§ 273, 296; Wells v. Rodgers, 60 Mich. 525; Heintzelman v. Druids' Relief Ass'n, 38 Minn. 138.

Where all the directors are present at a meeting, no notice thereof need have been given. Cook, Stock & S. § 599; 1 Mor. Priv. Corp. §§ 490, 531; Kenton Furnace Co. v. McAlpine, 5 Fed. Rep. 744, 745.

Error is claimed by appellant because the secretary was allowed to testify as to the contents of the notice of the call mailed to the defendant. It was shown that written notice to produce the notice had been given to the defendant and that he had failed to comply therewith. Consequently, secondary evidence of the contents of the notice was admissible. The witness stated that a general form of the notice to be sent to all the stockholders, had been prepared by plaintiff's counsel, and that he might have a copy of that general form, not of the notice sent. In Hughes v. Antietam Mfg. Co., 34 Md. 316, it was held that constructive notice by mail is not a personal notice, but if that notice is actually received, it becomes effective as a personal notice. The presumption is that letters duly directed and mailed reach their destination. Melby v. D. M. Osborne & Co., 33 Minn. 492. If the subscriber denies that he received the notice mailed, the question whether he did so, is one of fact for the jury. Bradick v. Philadelphia, M. & M. R. Co., 45 N. J. Law, 363. For a general discussion of this question of notice by mail, see Cook, Stock & S. § 119. The only requirement of the statute is that the defendant be notified. A verbal notice to the defendant satisfies that requirement. Cook, Stock & S. § 119.

MITCHELL, J. This was an action to recover a call or assessment on the stock of the plaintiff corporation.

From an examination of the record we are satisfied that the trial court correctly ruled that upon the evidence the only question for the jury was whether the defendant had notice of the assessment, and upon that question the evidence abundantly justified the verdict. It must consequently be affirmed, unless the court committed some error of law during the trial.

- 1. The allowance of the amendments to the complaint on the trial was clearly a proper exercise of discretion on part of the court.
- 2. It is contended that the court erred in admitting the testimony of plaintiff's secretary as to the contents of the notice of the call which he sent to defendant, for the reason that the secretary had a copy of the notice, which would have been better evidence than his recollection of its contents.

We do not think the case presents the question which counsel seeks to raise, viz. whether the law recognizes any degrees in the various kinds of secondary evidence.

The secretary testified that the notices which he sent to stockholders were dictated by him to a typewriter from a general form which had been furnished by the attorneys of the company for use on such occasions, but that he could not say that he accurately followed the form; that this form had blanks for names, amounts, signatures, etc., which had to be filled up in the notices sent out. He testified that he thought he had a copy of this general form in his office, but that he did not know whether he had any copy of the notice which he sent to defendant. It did not appear that the notice sent out was ever compared with the general form used in dictating it. It is very evident that on this state of facts the copy of the general form, even if offered, would not have been admissible, because it was not a copy of the notice; and it was not made to appear that plaintiff had any such copy in its possession. Even under what is sometimes called the "American doctrine." -that a copy of a document is better evidence than the recollection of a witness as to its contents.—the rule is that, where the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also prove that it was known to the other party in season to have been produced on the trial. 1 Greenl. Ev. § 84, note.

3. If it was the fact that the special meeting of the directors which made the assessment was not called upon notice as provided in the by-laws, it is wholly immaterial, for the reason that all the directors were personally present, and participated in mak-

ing the assessment. The only object of notice is that the directors have an opportunity of being present at the meeting and taking part in its proceedings.

4. Some exceptions were taken to the charge of the court on the subject of notice. The statute under which plaintiff was organized provides that the directors may call in the subscription to the capital stock by installments "by giving such notice thereof as the by-laws shall prescribe." Plaintiff's by-laws made no provision on the subject of notice, but the court correctly instructed the jury that the notice must be actual or personal, so that, if sent by mail, it would be effectual only when received.

In some portions of his charge the learned judge inaccurately used the expression "notice or knowledge," which might have been understood as meaning that it would be sufficient if the defendant by any means or from any source ascertained the fact that an assessment had been made on his stock. Of course, this would not be correct, for, while no particular form is necessary, yet the notice must come from the proper corporate authority, and give the stockholder to understand that a call has been made, and that he is requested to pay the amount. But when the court's attention was called to this inaccuracy of expression he immediately corrected it by instructing the jury that the defendant "must either have had notice or he must have promised to pay with full knowledge of the assessment, one or the other." It seems to us that this must have prevented or removed any misconception on part of the jury. If, however, defendant still feared that they might misunderstand what was meant by "notice," he should have asked for more specific instructions.

Order affirmed.

Vanderburgh, J., absent, took no part.

(Opinion published 55 N. W. Rep. 546.)

Application for reargument denied June 13, 1898.

v.53m.—25

53 386 54 468 John Jagger vs. National German-American Bank of St. Paul.

Argued May 24, 1898. Decided June 1, 1893.

Bank's Implied Contract on Taking Paper for Collection.

When a bank receives commercial paper for collection there is an implied undertaking on its part that, in case of its dishonor, it will take all steps necessary to protect the holder's rights against all previous parties to the paper; and an allegation that the holder instructed the bank to do so only states what the law implies, and changes neither the issues nor the burden of proof.

Proof of Business Habits of a Witness not Receivable in Corroboration.

The collection clerk, to whom the paper was delivered, having testified that the holder told him not to protest it in case of nonpayment, and having in corroboration of his testimony introduced the collection book in which he had, at the time, made an entry to that effect, the defendant offered to prove that the clerk was a cautious, careful man, and that this was the only error ever attributed to him. Held, that the offered evidence was inadmissible.

Mere Knowledge is not Notice of Nonpayment to Charge an Indorser.

Mere knowledge on part of an indorser, derived from the maker, that paper has been dishonored, is not "notice." The notice must come from a party who is entitled to look to him for payment.

Appeal by defendant, the National German-American Bank, from an order of the District Court of Ramsey County, J. J. Egan, J., made October 29, 1892, denying its motion for a new trial.

On October 1, 1889, the plaintiff, John Jagger, left with defendant for collection, a note for \$700 and interest, made by George S. Acker and indorsed by W. D. Cornish and W. M. Bushnell, due May 10, 1890. When it fell due it was not paid. It was not protested or notice of nonpayment given the indorsers. Acker was insolvent, had no property not exempt from sale on execution. This action is to recover damages for failure to protest and give notice. Defendant claims that when plaintiff left the note for collection, he directed that it should not be protested or notice given in case of nonpayment. Plaintiff had a verdict for \$852.49.

John B. & E. P. Sanborn, for appellant. C. D. & Thos. D. O'Brien, for respondent.

MITCHELL, J. This was an action to recover damages for the alleged failure of the defendant to take the necessary steps to fix the liability of the indorsers on a promissory note which plaintiff deposited with it for collection. The allegation of the complaint is that plaintiff delivered the note to the bank for collection, "notifying it to take all necessary steps, in case of nonpayment of the note at maturity, to hold the indorsers upon the same by due notice of nonpayment."

Defendant insists that, having alleged express instructions to the bank, plaintiff was bound to prove it, and could not rest on the undertaking of the bank implied from the mere fact of receiving the paper for collection. There is nothing in this. The complaint alleged nothing more than would have been implied in the absence of any express instructions.

The allegation referred to neither changed the issues nor the burden of proof. The position of counsel is, in effect, that if a party alleges more than is necessary he is bound to prove it.

2. Defendant's collection clerk testified that when plaintiff delivered the note for collection he notified him not to protest it, and in corroboration of this he was allowed to introduce in evidence the collection book, in which he made an entry at the time that the note was not to be protested. It can hardly be necessary to say that it would not have been competent, for any purpose, to prove that this clerk was a cautious, careful man, and this was the only error ever attributed to him. If he committed an error on this occasion the defendant is liable, although it may have been the only mistake he ever made.

Nor would the evidence offered have any legal bearing upon the question at issue, viz. whether the plaintiff gave express instructions not to protest the note.

3. Defendant offered to prove that the maker of the note, at the time it fell due, notified the plaintiff that it would not be paid, and that the latter said "he would carry the note along for a time;" also, that on the day the note fell due, or the day subsequent, the maker notified one of the indorsers of the dishonor of the note.

If this evidence was offered for the purpose of proving that plaintiff had knowledge of the dishonor of the note, and therefore should himself have notified the indorsers, the answer is that he had intrusted that matter to the defendant, and had a right to assume that it would attend to it. If it was offered for the purpose of proving that plaintiff had extended the time of payment to the maker, and thereby himself released the indorsers, it is enough to say that the evidence had no tendency to prove any such extension. And if it was offered for the purpose of proving that the indorsers had notice of the dishonor of the paper, and therefore were not released, the answer is that what was offered to be proved would have been insufficient as notice in respect to both its source and its substance. Mere knowledge of the dishonor of paper is not notice. Notice signifies more. It must come from one who is entitled to look to the party for payment, and must inform him (1) that the note has been duly presented for payment; (2) that it has been dishonored; (3) that the holder looks to him for payment. Although, probably, if the notice comes from the proper party, and contains the first two of these requisites, the third would be implied. The evidence was inadmissible for any purpose.

Order affirmed.

Vanderburgh, J., absent, took no part. (Opinion published 55 N. W. Rep. 545.)



COLYER S. WENTWORTH et al. vs. JEROME F. TUBBS et al.

Argued May 28, 1898. Decided June 1, 1893.

Liens Date from the Commencement of the Improvement on the Land.

As respects the date of acquiring a lien, the term "furnish," as used in the mechanic's lien law, means furnished on the premises; and the liens of all mechanics and material men attach as of the date of the performance of the first work, or the delivery of the first material on the ground; that is, from the commencement of the improvement on the land.

Subrogation, when Refused.

Upon the facts found, a mortgagee was not entitled to be subrogated to the rights of the holders of certain lienable claims against the mortgaged premises, which he paid with the proceeds of the mortgage.

Appeal by Charles S. Sedgwick, one of the defendants, from a judgment of the District Court of Hennepin County, Thomas Canty, J., entered April 30, 1892.

On February 1, 1890, the defendant Jerome F. Tubbs employed the defendant Charles S. Sedgwick, an architect, to make plans and specifications for a building which he proposed to construct on lot twelve (12) on block ten (10) in Penniman's Addition to Minneapolis. For several months from that time the architect was engaged at his office in that work. On March 13, 1890, Tubbs mortgaged the property to Mary A. Topliff for \$13,000. This mort gage was recorded March 26, 1890. Nothing was done on the lot prior to March 27, 1890, to indicate or suggest that a building was to be erected on it. Soon after that day, work was commenced and prosecuted for a year thereafter. Above thirty persons did work and furnished materials, and they and Sedgwick all filed liens. On August 5, 1890, Mary A. Topliff loaned to Tubbs the further sum of \$10,000 to pay for work and materials, and took a second mortgage on the property. This second mortgage was recorded August 11, 1890. These mortgages bore interest at the rate of ten per cent. a year.

At the time of making this second mortgage, and as a part of the transaction, it was agreed between the parties that the money should be paid upon the liens on the building. Of this sum \$9,581.67 was in fact so paid on liens. A partial payment was made to each lienholder. The lienors so receiving payments each agreed, in consideration of such part payment, that both Topliff mortgages should be prior and paramount to the balance of his lien. A large number, but not all, accepted partial payment and so agreed. Mrs. Topliff foreclosed her second mortgage under the power of sale therein, and on August 10, 1891, bid in the property for \$11,-140.59.

The plaintiffs, Coyler S. Wentworth and William G. Graham, partners, contracted with Tubbs on August 20, 1890, to furnish and set in the building, steam heating apparatus, valued at \$1,-

560.90. They did the work, filed a lien, took no partial payment and made no release to Mrs. Topliff. On July 9, 1891, they commenced this action to foreclose their lien. The owner Tubbs, the mortgagee Topliff, the architect Sedgwick and all the lien claimants were made defendants. Sedgwick's lien was for \$600, on which \$150 had been paid by Tubbs. He and eight other lien claimants, defendants, having liens amounting to \$1,586.19 took no partial payment from, and made no agreement with, Mrs. Topliff. The trial court held that plaintiff's lien for \$1,560.90, Sedgwick's lien for \$450, these eight other liens for \$1,586.19, and Mrs. Topliff's second mortgage to the amount of \$9,581.67 were co-ordinate and subject to the first mortgage, but paramount to all the other liens whose holders had so agreed with Mrs. Topliff. The property was adjudged to be sold subject to Mrs. Topliff's first mortgage, and the proceeds applied ratably on these paramount claims, and the excess, if any, upon the other liens. Defendant Sedgwick alone appealed. He appealed October 30, 1892, from so much of the judgment as decreed his lien subject to the first mortgage and that \$9,581.67 of the second mortgage was co-ordinate with his lien.

On the argument in this court, subsequent facts were conceded by the parties, viz. that on August 30, 1892, the premises were sold under the judgment appealed from, to defendant Wheaton for \$150; the sale was reported and duly confirmed. Meantime Mary A. Topliff had on September 7, 1891, foreclosed her first mortgage under the power therein, and bid in the property for the sum due on it. Wheaton filed notice and redeemed September 12, 1892, paying her \$16,795.67. No other lien claimant redeemed. Subsequently certain judgment creditors of Tubbs who had filed notices, redeemed from Wheaton, and the title now stands on the foreclosure of the first mortgage and the redemptions so made.

Roberts & Baxter, for appellant.

The defendant Sedgwick objects to the conclusion of law that his claim is inferior to the first mortgage. This contention is necessarily confined to the facts as shown in the findings, but the fact that an excavation had been begun upon the property prior to the making of the first loan by defendant Topliff, is sufficient to entitle Sedgwick to a judgment that his lien is superior to that of the

mortgage. The lien dates from the time of the furnishing of the first item of the labor, skill or material. There is nothing in the statute that the lien dates, so far as relates to subsequent incumbrances, only from the commencement of the building. Tibbetts v. Moore, 23 Cal. 208; Fleming v. Bumgarner, 29 Ind. 424; Bell v. Cooper, 26 Miss. 650; Montandon v. Deas, 14 Ala. 33; Gale v. Blaikie, 126 Mass. 274; Thielman v. Carr, 75 Ill. 385.

Great injustice has been done this defendant by making his lien co-ordinate with the lien of the second mortgage. In this case the mortgagee did not intend to put herself in a position to claim a lien in any other way than by virtue of her mortgage. making an effort to acquire the mechanic's liens she undertook to take such steps that the mechanic's liens would be subsequent and inferior to her mortgage; and she was successful in that attempt with a large majority of the lien claimants. So far from manifesting any purpose to enforce her claim upon said premises by the aid of the statute for mechanic's liens, she proceeded to foreclose her mortgage, and to bid in the premises for her claim. There is now no doubt about her intention; she not only took a mortgage for security for her debt, but she takes this mortgage security in satisfaction for her debt; her answer shows that she has no claim against anyone for her money; the indebtedness of Tubbs is paid by the foreclosure sale, and defendant Topliff has a mortgage lien upon the premises which has now matured into a title. She cannot in equity be subrogated to the right of a lien claimant, because the money she advanced went to pay claims that might have been enforced as mechanic's liens.

Daniel Fish, for respondent.

The question as to priority of Sedgwick's lien over the first mortgage is the only one of practical importance, for unless his claim is superior to that mortgage, it is extinguished by the foreclosure. The effect of the findings and the evident intention of the trial court was, to declare that the first mortgage was taken upon a vacant lot, in entire ignorance on the part of the mortgagee, that any building was contemplated. Upon that state of facts, Sedgwick contends that because at his office, he had commenced to draw

plans for a building of which the mortgagee had neither actual nor constructive notice, he is entitled to priority over the mortgage for his compensation.

Many of the cases cited arose under statutes which affix the lien as of the date when the contract was made. Such is the law of Mississippi, Massachusetts, Alabama, and Illinois. Our statute affixes the lien, as between lien claimant and mortgagees, at the date when the building is actually begun on the land. Gardner v. Leck, 52 Minn. 522. In at least twenty states, a similar law has been enacted. In those states the courts have held that such facts as are here disclosed are not sufficient to cut out a mortgage. All agree that the work done must be such as to indicate that a building is in progress. Brooks v. Lester, 36 Md. 65; 2 Jones, Liens, § 1469; Chapman v. Wadleigh, 33 Wis. 267; Taylor v. La Bar, 25 N. J. Eq. 222; Kelly v. Rosenstock, 45 Md. 389.

Appellant's second grievance is, that so much of the face of the second mortgage as was actually used to reduce the total of the liens, was admitted to share with him in the proceeds of the sale under the lien judgment. It appears that Tubbs had expended all his means, leaving the buildings unfinished, with a large indebtedness, all of which was lienable. At this juncture he applied to Mrs. Topliff for an additional loan of \$10,000, which was granted on condition that all existing liens should be cleared away. 851.67 was used in paying off these lien claims in part, and in procuring releases thereof as against both of the Topliff mortgages. Every person then having or claiming a lien, except Sedgwick, signed an agreement consenting to be postponed to said mortgages. The result was that the liens then existing were not only reduced by said sum of \$9,851.67 derived from the second mortgage, but the balance of these liens, then aggregating \$11,242.16, was postponed.

What the trial court did in this case was simply to subrogate Mrs. Topliff to the rights of the lien claimants to the extent of the money actually paid to them by her. Sedgwick was in no way harmed by this, for her payments had not only reduced the existing liens by the amounts so paid, but had given him priority with her over the balance. There is no difficulty in applying the

doctrine of subrogation to such a state of facts. Emmert v. Thompson, 49 Minn. 386.

MITCHELL, J. This action, which was to foreclose a mechanic's lien, is brought here on the findings of the court, without any case or bill of exceptions, and hence the only question is whether the conclusions of law are justified by the findings of fact. Tubbs is the owner of the premises, who contracted for the construction of the building. Topliff is a mortgagee of the premises, and the other defendants and the plaintiff claim liens for labor and material performed or furnished for the construction of the building. As Sedgwick is the only appellant, and as his assignments of error relate only to the decision of the court in favor of Topliff, we have only to consider the relative rights of these two parties.

Sedgwick claims a lien for labor and skill performed and furnished, at the request of Tubbs, in preparing plans for the building, and in superintending its construction. The court finds "that he commenced to draw the plans on the 1st of February, 1890, but that this work was then commenced in his office, and not upon the ground; that there was nothing upon the premises up to May 26, 1890, to indicate that any architect had been employed for any purpose in connection with the premises, or for the purpose of erecting any building or structure thereon; and that up to said time said architect performed no labor, services, or skill upon said premises." The court also finds that "after said 26th of May, 1890, said Tubbs commenced the erection of a building on said lot." We construe this as meaning that no work had been commenced and no labor performed or materials furnished on the premises by any one until after May 26th.

There is a finding that Tubbs caused an excavation to be made on the lot about March 1, 1890, but there is none as to its extent and character, or that it had any relation to the erection of this building; hence we deem the finding wholly immaterial.

Topliff's claim is based on two mortgages on the premises, executed by Tubbs,—one for \$13,000, executed March 13, 1890, and recorded on the 26th of the same month; and the other for \$10,000, executed August 5, 1890, while the building was in process of erection, and recorded the 11th of the same month.

1. Appellant's first assignment of error is that the court erred in holding that his lien was inferior and subordinate to the lien This presents the question when appelof this first mortgage. lant's lien attached, his contention being that it was acquired Feb ruary 1, 1890, when he commenced drawing the plans for the build ing in his office. This involves the construction of the statute. The mechanic's lien law nowhere in express terms declares when a lien attaches. Laws 1889, ch. 200, § 8, requires that the state ment filed shall contain the time when the first and last items of labor or material were furnished, and provides that the statement. when filed, "shall operate to continue such lien during all the period of time from the time of the furnishing of the first item of such labor, etc., until the expiration of one year after the time of furnishing the last item of the same."

It is on this provision that appellant relies for support for his contention. The tenth section of the act, in effect, provides that all liens for labor, material, etc., furnished for the construction of a building, without regard to the relative dates at which it was furnished, shall be co-ordinate, and without priority one over the other.

The time when a lien is to be considered as acquired depends upon the statute authorizing the remedy. The statutes are not uniform on the subject.

The larger number fix the commencement of the work on the premises—the first labor done or materials furnished on the ground—as the date when the mechanic's or material man's lien attaches.

This is exceedingly fair and liberal to the mechanic, especially under our statute making all liens co-ordinate; so that all who furnish material or labor at any time during the process of construction of the building get a preference over all other liens of a date posterior to "the commencement of improvement on the land" by the one who performs the first labor or furnishes the first material on the ground. Gardner v. Leck, 52 Minn. 522, (54 N. W. Rep. 746.) This works no injustice to any one dealing with the property, as the work itself is notice to all of the mechanics' claims. It enables them by ocular examination to ascertain whether they can do so safely.

But, on the other hand, it would be very unjust if the land could be afterwards swallowed up by mechanics' liens for work which had not been commenced on the ground, and of which consequently one who might buy the property or take a mortgage upon it had no notice or means of knowledge when he took his deed or his mortgage.

The injustice of this would be forcibly illustrated by the facts of this case, where appellant claims a lien as of the date of February 1st, when he perhaps began the mental labor or skill of designing the plans of the proposed building, which furnished no visible trace of work or labor on the ground itself. If the date of the lien could thus antedate the actual commencement of operations on the premises three months, there is no reason why it might not antedate it three years.

The injustice of this would be intensified under our statute, in view of the fact that the date of the lien of the person who furnished the first material or labor would fix the date of all other mechanics' liens, regardless of the dates at which such material or labor was in fact furnished. Hence we ought not to give to the statute the construction contended for by appellant, unless it will not reasonably admit of any other; and in determining the meaning of the phrase "time of furnishing," as used in the eighth section, reference should be had to all the other provisions of the act, as well as its general scope and plan. Of course, as against the owner who contracts for the erection of the building, the question when a mechanic's lien attaches is of no practical importance. It only becomes material with reference to subsequent purchasers and mortgagees. Taking into consideration all the different provisions of the statute, as well as our previous decisions construing it, we are of the opinion that, as regards the date of acquiring a lien, the word "furnished" or "furnishing," as used in the law, means furnished on the premises, and that the liens of mechanics or material men all attach as of the date of the performance of the first work or the delivery of the first material on the ground.

This was the view taken in Glass v. Freeburg, 50 Minn. 386, (52 N. W. Rep. 900,) and Gardner v. Leck, supra, and it was upon this theory of the law that in the latter case it was held that all liens for labor or material furnished by any one, at any time during the

progress of the work, attach as of the date of the commencement of improvement on the land.

Our decisions to the effect that a party might, under certain circumstances, have a lien for material which was never actually delivered on the premises, or not actually used in the building, are not inconsistent with this view. In all these cases it will be found that not only was no question of bona fide purchaser or mortgagee involved, but in every instance there was in fact a building in process of construction, and the material was either in fact delivered on the premises, but subsequently diverted by the contractor, or its delivery was prevented by the fault of the owner. See Howes v. Reliance Wire-Works Co., 46 Minn. 44-48, (48 N. W. Rep. 448;) Hickey v. Collom, 47 Minn. 565, (50 N. W. Rep. 918;) Burns v. Sewell, 48 Minn. 425, (51 N. W. Rep. 224.)

2. Topliff's second mortgage was given to secure a loan of \$10,000. The court finds that, at the time this mortgage was made, it was agreed between the parties thereto that the money thus borrowed should be paid by the mortgagee to persons holding liens on the premises for labor and material furnished in the erection of this building, and releases of such claims procured from the holders; that, pursuant to this arrangement, the mortgagee paid over the proceeds of the mortgage on claims due for labor and material so furnished by persons holding liens therefor; that the amount so paid operated to extinguish liens on the premises to that amount, which were co-ordinate and of equal priority with the other liens for labor and material, including that of appellant, enumerated in what, in the findings, is called the "Second Division." When the court speaks of these claims, to the payment of which the proceeds of this mortgage was applied, as being liens on the premises, we understand that he means what, for want of a better term, we may call "inchoate liens;" for it is not found that either the holders or any one else had ever filed statements of liens as required by the statutes.

Inasmuch as the proceeds of this second Topliff mortgage were thus used to pay off claims which were lienable against the property, and thereby reduced by that amount the liens which would have been co-ordinate with the lien of appellant and the other liens of the "second division," the court held, on what he considered the doctrine of equitable subrogation, that the lien of the mortgage was co-ordinate with the liens of the "second division," and directed the distribution of the proceeds of the sale of the premises on that basis.

This is the subject of appellant's second and third assignment of error.

As this goes only to the distribution of the proceeds of the sale, and will not affect the sale itself, and inasmuch as it was admitted on the argument that the sale had already taken place at which the premises (which were sold subject to Topliff's first mortgage) only brought the gross sum of \$150, this question is of no real practical importance, as appellant's share would only be a very few dollars. But we are unable to see how, upon the facts, the doctrine of subrogation can apply. This doctrine, we are aware, is a favorite one with the courts, but its application is regulated by certain well-defined rules.

It can only apply where the payment operates as a purchase or equitable assignment, and not an extinguishment of a claim. It only applies in favor of one who has bought the debt either expressly or by paying it under circumstances which render the payment equivalent to a purchase. Whether the payment amounts to a purchase or an extinguishment is really a question of intention, either express or presumed from the relation of the party to the debt or other circumstances under which the payment was made. There is no finding that the parties intended the payment of these claims as a purchase, or intended that they should be kept alive for the benefit of Topliff. On the contrary, the court finds that the agreement was that she should pay the claims, and obtain releases therefor, and that the payment operated to extinguish them.

Nor are any facts found from which an intention to keep the claims alive can be presumed. The payment was not made by one collaterally liable for the debts, when the law, by reason of the right of the party, would presume that the payment was intended as a purchase, and not as an extinguishment. Neither is it found that, as in *Emmert v. Thompson*, 49 Minn. 386, (52 N. W. Rep. 31,) the payment was made under any mistake of fact as to the state of the title of the premises. So far as appears, Topliff obtained just

the security under her mortgage which she expected to get, with these claims extinguished. In short, the facts found do not bring the case within any recognized ground for equitable subrogation. The mere fact that, if subrogation is not allowed, the other lienors may be in better position, or, if allowed, may be in no worse position than if these claims had not been paid, is not, of itself, ground for subrogation. Judgment modified in so far as it makes the second Topliff mortgage co-ordinate with plaintiff's lien; but the amount is so trifling that appellant is not entitled to statutory costs.

Vanderburgh, J., absent, took no part. (Opinion published 55 N. W. Rep. 543.)

ST. PAUL & DULUTH RAILROAD Co. vs. VILLAGE OF HINCKLEY.

Argued May 11, 1893. Decided June 6, 1893.

Adverse Possession as against the Claim of the Public to a Street.

Facts found, considered as not showing that the exclusive occupancy for fifteen years, by a railroad for station yard purposes, of land previously dedicated (but not used) as a public highway, was not adverse to the public, so as to have conferred title by adverse possession; the court not having found that such possession was adverse. MITCHELL, J., dissenting.

Appeal by plaintiff, St. Paul and Duluth Railroad Company, from an order of the District Court of Pine County, F. M. Crosby, J., made November 28, 1892, denying its motion for a new trial.

The plaintiff brought this action to restrain the defendant, the Village of Hinckley, from opening and improving South Main Street, across the tracks of its railroad. The Village was laid out and platted prior to 1871, and this street dedicated to the public. But the part of it in question was never opened for public travel or worked or improved at the public cost. In the Spring of 1877, the Lake Superior and Mississippi Railroad Company laid the main track and two side tracks of its road across the street. It afterwards sold and conveyed its railroad to the plaintiff. These tracks

have been used and maintained by the two companies ever since they were constructed. This use of the locus in quo has been such as to exclude the public from the use thereof. The two companies ran their cars over these tracks, switched, made up trains, and left cars standing thereon. Neither the plaintiff nor its predecessor ever had any claim, or color of title, to this part of the street, other than the rights acquired by such occupation. To now open and grade the street would cut the plaintiff's station yard at Hinckley into two parts and greatly interfere with its business.

This action was commenced August 4, 1892, and a temporary injunction issued. The issues were tried and findings filed October 13, 1892. The court found that plaintiff was not entitled to relief and directed judgment to be entered against it for costs, and dissolving the temporary writ. A motion for a new trial was denied, and plaintiff appealed December 5, 1892. Some subsequent proceedings for contempt, in disobeying the injunction are reported. In re Saunders, ante, p. 102.

Lusk, Bunn & Hadley and J. D. Armstrong, for appellant.

The facts found show actual, open, exclusive and continuous possession in the plaintiff for over fifteen years prior to the commencement of this action. The ground has never been traveled or used as a street. The plaintiff has continuously used it as part of its railroad yard; has run cars over the same, and left them standing thereon; its use has been such as to exclude the public from the use thereof. So far as the character of the occupation is concerned, it has abundantly satisfied every requirement of the law to make it adverse. The public lose the right to occupy a street by adverse occupation on the same principle upon which a private right to land is lost. This case is not different from the same acts of occupation exercised on private property. City of St. Paul v. Chicago, M. & St. P. Ry. Co., 45 Minn. 387.

Actual, continuous, open occupation for fifteen years being shown, it is to be presumed after this lapse of time that it was hostile and under claim of right. Occupation for the statutory period is of little weight or value, if it is not *prima facie* proof of an entry under claim of right; for after the lapse of time, further proof is often impossible, and the longer the occupation, the more impossible.

The inference drawn by the trial court of an original trespass or license, is contrary to the fundamental doctrine of title by adverse occupation or prescription. Seymour, Sabin & Co. v. Carli, 31 Minn. 81; Coleman v. Northern Pacific R. Co., 36 Minn. 525; Brown v. Morgan, 44 Minn. 432; Ramsey v. Glenny, 45 Minn. 401; Village of Glencoe v. Wadsworth, 48 Minn. 402; Village of Wayzata v. Great Northern Ry. Co., 50 Minn. 438; Illinois Central R. Co. v. Houghton, 126 Ill. 233; Doe v. Lawley, 13 Q. B. 954; Johnson v. Gorham, 38 Conn. 522.

The adverse intention is presumed in the absence of admissions to the contrary or other proof that it was permissive only. As acts speak louder than words, the hostility of possession is best and sufficiently shown, by its actual, notorious and exclusive character; the mere fact of such possession, in general indicates that it was adverse.

Robert C. Saunders, for respondent.

Action by the Railroad Company to restrain the Village from opening and maintaining a public street, crossing over the tracks of the Railroad Company.

Possession, to bar the title of the legal owner, must be hostile or adverse, actual, visible, notorious and exclusive, continuous and under claim or color of title. In any given case, every one of these essential elements must exist, and they must be affirmatively shown by the occupant. The existence of one is not to be presumed from the existence of any or all of the others. In this case, two of these essential elements are conspicuous by their absence, namely hostility, and claim or color of title. The findings expressly negative a claim or color of title and are silent as to hostility of possession. Exclusive possession is not adverse possession. Thompson v. Felton, 54 Cal. 547.

Plaintiff requires the court to make two presumptions, first, that it entered under claim or color of title, and second, that its possession has been adverse. A presumption from a presumption cannot be indulged in. Manning v. Insurance Company, 100 U. S. 693; Philadelphia City Passenger Ry. Co. v. Henrice, 92 Pa. St. 431; Danley v. Rector, 10 Ark. 211.

The court below found as a fact that the plaintiff entered without claim or color of title. Necessarily its occupancy was that of a trespasser or licensee. There is no room for any presumption in the case. The possession of a mere trespasser entering and holding without claim of right, is not adverse to the rightful owner and does not ripen into title by the lapse of time. Clark's Lessee v. Courtney, 5 Pet. 319; Bernstein v. Humes, 78 Ala. 134; Village of Wayzata v. Great Northern Ry. Co., 46 Minn. 505.

It has been held in many jurisdictions that title to a public highway cannot be gained by occupancy, even though all the essential elements of adverse possession exist. Hoadley v. City & County of San Francisco, 50 Cal. 265; Brooks v. Riding, 46 Ind. 15; Indianapolis, P. & C. R. Co. v. Ross, 47 Ind. 25; Webber v. Chapman, 42 N. H. 326.

And though such is not the doctrine in this state, yet this court has never gone so far as to indulge unfavorable presumptions against the public.

Dickinson, J. By this action the plaintiff seeks to have the defendant enjoined from opening and maintaining a public street across its railroad tracks and station yard. The case involved an issue of fact as to whether the plaintiff had, by adverse possession of the premises for the period of fifteen years, acquired a right to the same to the exclusion of the public. The plaintiff, appealing from an order denying a new trial, brings before us for review only the findings and conclusion of the court, upon which judgment was directed for the defendant.

It appears from the findings of the court that the premises in question became a highway by dedication as early as 1872, but that, until recently, this part of the highway or street had not been needed for public use, and had not been opened for public travel. More than fifteen years before the commencement of this action the plaintiff had entered upon the part of the street here in question, laid its tracks across the same, consisting of a main track and two side tracks, which it has ever since maintained and operated, using these premises as a part of its railroad yard. The court found that this use of the land by the plaintiff had been such as to exclude the public from the use thereof. We under-y.53m.—26

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stand the meaning of this to be that the use by the railroad was of such a nature as to be incompatible with a use of the same premises by the public. The court also found that the plaintiff never had any claim or color of title except such as may arise from the facts found. The conclusion and decision of the court was that the plaintiff was not entitled to any relief against the proposed opening of the street.

The contention of the plaintiff is that, upon the facts found, judgment should have been directed in its favor, upon the ground that by its adverse possession for fifteen years the public easement had been extinguished. Adverse possession may have such an effect, even against the public. City of St. Paul v. Chicago, M. & St. P. Ry. Co., 45 Minn. 387, (48 N. W. Rep. 17.) It will, however, be noticed, and it is virtually conceded on the part of the plaintiff, that the express findings of the court do not embrace one of the facts always essential to constitute title by adverse possession, viz. that the possession was hostile or adverse. The court has not so found; but the plaintiff insists that it is necessarily to be inferred, from the facts found, that the plaintiff's possession was hostile, and hence that the court erred in its conclusion. plaintiff would have us, on appeal, infer the existence of the fact referred to; and having thus supplied, by inference, the fact which is necessary for the plaintiff's case, we are asked to declare that the conclusion of the court below was wrong. This cannot be done. We may accept as correct the proposition that from the facts as found by the court, if those were the only facts shown on a trial, the inference of fact would naturally be drawn that the plaintiff's possession was adverse to the public. But whether the possession was adverse-hostile-is a matter of fact, and not of We are asked on appeal to supply by inference a fact which is essential to the plaintiff's case, and without which the decision of It is not for an appellate court to do the court below was right. this, (Miller v. Chatterton, 46 Minn. 338, 48 N. W. Rep. 1109;) and, even if it were true that, under any circumstances, we could supply facts by intendment, we cannot do so in this case, upon a review of the findings only, and without the evidence. The facts in issue, and upon which a judgment is to rest, must be established by the evidence and admissions of the parties at the trial, and no fact

necessarily involved in the issues can be judicially determined in ignorance or disregard of the evidence. However natural might be the inference of fact that the plaintiff's possession was hostile, if, upon the trial, only such facts should be disclosed as are expressed in these findings of the court, yet how can we know or assume that in the trial of this case the evidence was not such as to render that inference doubtful, or even impossible? The facts found are not necessarily, and in their nature, inconsistent with the plaintiff's occupancy having been in subordination to, and in constant and express recognition of, the right of the public to use the premises for street purposes whenever such use should become necessary or expedient. If we were to now infer, as a fact, that the possession was adverse, our inference might be directly contrary to the facts as shown by the evidence. The findings before us do not compel such an inference.

The burden of proof was upon the plaintiff. If it does not here show a case justifying relief, it must fail, and judgment was rightly ordered for the defendant. Its remedy for curing a defect in the finding of facts which it had to establish was by motion in the trial court for a specific finding upon this issue.

Order affirmed.

MITCHELL, J. I am unable to concur with the views of my brethren. In my opinion the assumption that there might have been other facts established by the evidence which would modify the effect of the facts found is wholly unwarranted. On the contrary, I think we are bound to assume that the court found all the material facts which the evidence established. The facts found are in effect that plaintiff's possession was continued, exclusive, and just as incompatible with any use of the premises by the public as if they had been covered with buildings. From these facts, in the absence of any other modifying or doing away with their force, the adverse or hostile character of the possession followed as a conclusion or inference of law.

VANDERBURGH, J., did not participate in this decision.

(Opinion published 55 N. W. Rep. 560.)

Application for reargument denied June 16, 1898.

EUGENE A. HENDRICKSON vs. BRIDGET TRACY et al.

Submitted on briefs May 5, 1893. Decided June 6, 1893.

Findings Supported by the Evidence.

A finding of the court upon conflicting evidence held justified.

New Trial for Newly-Discovered Evidence.

Application for a new trial for newly-discovered evidence held not well supported; the party having gone to trial without seeking a postponement to enable him to ascertain the whereabouts, and procure the testimony, of a person known to be a material witness.

Appeal by plaintiff, Eugene A. Hendrickson, from an order of the District Court of Ramsey County, J. J. Egan, J., made September 12, 1892, denying his motion for a new trial.

The newly-discovered evidence on which the motion for a new trial was based, was that of George Wallbridge, that he witnessed a release by defendant, Bridget Tracy, of her mortgage on the residence lot, as well as the release of her mortgage on the business lot. At the time of the trial Wallbridge was at Prentice, Wisconsin, and plaintiff, after diligent inquiry, was unable to ascertain where he was. He has since learned his residence, and if a new trial should be granted, the personal presence of the witness could be secured at such new trial.

James H. Foote and John D. O'Brien, for appellant. Joseph Schroll, for respondent.

DICKINSON, J. In January, 1889, the defendants Thomas and Lawrence Tracy owned two tracts of land in the city of St. Paul, one of which may be called the "residence lot," and the other the "business lot." At that time, and on the same day, they executed to the defendant Bridget Tracy, who is their mother, a mortgage of the residence lot to secure the payment of the sum of \$1,500, and a separate mortgage of the business lot to secure the further sum of \$1,500. In July following they executed to the London & Northwest American Mortgage Company, (Limited,) a mortgage covering both lots, to secure the repayment of \$8,500, then loaned to them by that company. The latter mortgage was afterwards fore closed; this plaintiff, who was a managing agent of the com-

pany, being the purchaser. He prosecutes this action to secure the cancellation of the \$1,500 mortgage on the residence lot, upon the ground that it was released by the mortgagee, Bridget Tracy, at the time or prior to the execution of the \$8,500 mortgage, for the purpose, as is claimed, of allowing the latter mortgage to have priority, and with the agreement that her mortgage security should be renewed subsequent to the execution of the \$8,500 mortgage. The issue of fact in the case was as to whether she had executed a formal release of her mortgage on the residence lot. The court found that she had not. We are asked to reverse this determination on the ground that it was not justified by the evidence.

In view of all the evidence the finding of the court must be sustained. We shall not here set forth the evidence going to support the plaintiff's contention, but only briefly indicate the nature of that on the part of the defendants, by reason of which we think that the finding of the court, who heard the testimony and could best judge of the credibility of the witnesses, should be accepted as final.

It is an admitted fact that, on the occasion when it is claimed that Bridget Tracy executed the release in question, she did execute another instrument releasing her mortgage on the business lot. is also an undisputed fact that, if a release of the mortgage on the residence lot was executed, it was a separate instrument from the other; so that if, in fact, she then executed only one instrument, the conclusion would be inevitable that she did not execute the release in question. Her own testimony was that she did not execute a release of this mortgage, and that she executed only one instrument, that being the release of the mortgage on the business The notary public who took her acknowledgment thinks there was only one paper executed, although he is not positive. One Garlough, who was present, testifies that there was only one. the same effect, and in positive terms, is the testimony of three sons of Bridget, two of whom were the mortgagors, and the third of whom appears to have subscribed his mother's name to the release which was then executed of the other mortgage. It must be admitted that the testimony of some of these witnesses, as it appears in the record, is not beyond criticism, but the opportunity of the trial court to judge of their credibility was better than ours. Besides, this evidence is the more credible from the facts that this

business was transacted, in behalf of the company in whose favor the release was made, if at all, by business men, who understood the importance of the instrument; and, while the other release was properly taken care of and placed on record, as we understand, the one here in question was never recorded, and the plaintiff was compelled to rely upon proof that after its delivery it had been lost. Besides this, the proof does not clearly show, if it shows at all, any agreement on the part of Mrs. Tracy, prior to the time when she executed whatever instruments she did execute, that she would release these mortgages. It is to be considered, too, that the burden of proof rested on the plaintiff.

The strongest circumstance in favor of the plaintiff is the fact that after the giving of the \$8,500 mortgage (one, at least, of the \$1,500 mortgages having been released) there was executed and placed on record a mortgage to Bridget for the sum of \$3,000, covering both lots, and bearing date the same as her two former mortgages. Her explanation of that is that she did not know of the execution of this mortgage for that amount until long afterwards; and it appears that she was not present when it was prepared or placed on record.

Our conclusion is that the evidence was sufficient to support the finding of the court.

Upon the point that the mortgage on the residence lot was void for uncertainty in the description of the premises, it is only necessary to say that the action was evidently not brought to avoid the mortgage upon that ground. That was not the subject of this litigation.

There was no error in refusing the motion for a new trial, so far as it was based on the ground of newly-discovered evidence. The importance of the testimony of Wallbridge, who was a subscribing witness to the execution of the other release, was known when the case came on for trial; yet the plaintiff does not appear to have sought a postponement of the trial to enable him to ascertain the whereabouts, and to secure the testimony, of that person. This is a sufficient reason to support the ruling of the court.

Order affirmed.

Vanderburgh, J., being absent, did not take part in this decision. (Opinion published 55 N. W. Rep. 632.)

Union Railway Storage Co. vs. John R. McDermott et al.

Argued May 9, 1893. Decided June 6, 1893.

Parties to Actions on Contract.

Jefferson v. Asch, post, p. 446, followed. denying the right of a stranger to a contract to sue upon it, the promisee owing him no duty in the premises.

Appeal by the plaintiff, Union Railway Storage Company, from an order of the District Court of Hennepin County, *Henry G. Hicks*, J., made October 22, 1892, sustaining a demurrer to the complaint.

On June 15, 1891, the defendant, John R. McDermott, entered into a contract with the United States to furnish materials and construct, on the Military Reservation of Fort Snelling, six single sets of Officers' Quarters, according to plans and specifications, for \$23,894. He covenanted with the United States to be responsible for, and pay all liabilities incurred for, labor and materials in fulfillment of this contract. All rights of action, however, for any breach of the contract were reserved to the United States. On the same day McDermott, as principal, and the defendants Joel B. Bassett and Edwin C. Whitney, as sureties, entered into a bond to the United States in the penal sum of \$5,000 conditioned that if McDermott should duly and fully observe and perform the contract, including the stipulation to pay all liabilities incurred for labor and material, then the obligation to be void, otherwise of force.

The plaintiff, a corporation, sold and delivered to McDermott 130,000 brick to be used, and which were used, in the construction of the buildings, for which he agreed to pay it \$1,781. This action is to recover of the defendants, McDermott, Bassett and Whitney \$631, the unpaid balance due for the brick. The action is founded on the bond to the United States, but no assignment from the United States or any action on its part is alleged. The defendants severally demurred and the demurrers were sustained.

Kellogg & Laybourn, for appellant.

The authority of the Secretary of War of the United States to exact a bond from contractors, is contained in Act of April 10,

1878, 20 U. S. Stat. 36, as amended by Act of March 3, 1883, 22 U. S. Stat. 487. By it the Secretary may require the contractor to give bond, with good and sufficient sureties to furnish the supplies proposed or to perform the services required. Plaintiff contends that this contract in the bond was made for its benefit and that this suit is correctly brought. It was not a contract to indemnify the United States, for it could in no way become liable to material men, or be sued, nor could a lien be filed on its property. If then, it is not a contract limited to indemnify, it is a contract made for plaintiff's benefit, in which the United States acting through its officers, is the trustee. If we are correct in this position, then we are within the doctrine of Maxfield v. Schwartz, 43 Minn. 221; Lowry v. Adams, 22 Vt. 160; Dunlap v. McNeil, 35 Ind. 316; Dewey v. State, 91 Ind. 173; Conn v. State, 125 Ind. 514.

This action is on the contract between McDermott and the plaintiff, to secure the performance of which the bond was given to the United States in trust for plaintiff. The action is not upon the contract between the United States and McDermott in which all rights of action are reserved to the United States.

The action is rightly brought under 1878 G. S. ch. 66, § 26, providing that every action shall be prosecuted in the name of the real party in interest. Sprague v. Wells, 47 Minn. 504; Baker v. Bartol, 7 Cal. 551.

Kitchel, Cohen & Shaw, for respondents Bassett and Whitney.

Under what circumstances a stranger to a contract may maintain an action upon it, is a vexed question in both English and American jurisprudence. State Bank of Duluth v. Heney, 40 Minn. 145; Follansbee v. Johnson, 28 Minn. 311.

The right of a third person to maintain an action upon contracts between others, has been recognized in this State in two distinct classes of cases.

First, where the promisor receives from the promisee property which would ordinarily go to liquidate the claim of the third person, and as a part of the consideration for the transfer of the property the transferee agrees to pay the third person's claim. Follanshee v. Johnson, 28 Minn. 311; Sanders v. Classon, 13 Minn. 379, (Gil. 352;)

Jordan v. White, 20 Minn. 91, (Gil. 77;) Sullivan v. Murphy, 23 Minn. 6; Welsh v. First Div. St. Paul & Pac. R. Co., 25 Minn. 814; Maxfield v. Schwartz, 43 Minn. 221.

Second, where an obligation is required by statute for the use and benefit of a designated class of persons, notably for the benefit of those who supply labor or material in the construction of public works, when the public authorities are not themselves liable for the obligation incurred, and the structure itself is not subject to lien. City of St. Paul v. Butler, 30 Minn. 459; Morton v. Power, 33 Minn. 521; State Bank v. Heney, 40 Minn. 145; City of Duluth v. Heney, 43 Minn. 155; Freeman v. Berkey, 45 Minn. 438; Sepp v. McCann, 47 Minn. 364. Suits on bonds made in order to prevent liens from attaching to buildings under 1878 G. S. ch. 90, § 3, belong to this latter class. Casson v. Maxwell, 39 Minn. 391; Steffes v. Lemke, 40 Minn. 27; St. Paul Foundry Co. v. Wegmann, 40 Minn. 419.

The bond in suit was nothing more than a bond of indemnity for the exclusive benefit of the United States, and it alone can maintain an action upon it.

Geo. E. Young and J. M. Burlingame, for respondent McDermott.

This is not an action against McDermott for goods sold and delivered. There are no allegations in the complaint appropriate to such an action. The action is founded solely upon the contract and bond to the United States. To make the contract or bond beneficial to a third party so that he may bring action upon it in his own name and for his own benefit, the contract must have been entered into for such third person directly and primarily. Greenwood v. Sheldon, 31 Minn. 254; Dow v. Clark, 7 Gray, 198; Field v. Crawford, 6 Gray, 116; Mellen v. Whipple, 1 Gray, 317; Simson v. Brown, 68 N. Y. 355; Merrill v. Green, 55 N. Y. 270; Wood v. Newhall, 31 Fed. Rep. 434; Wright v. Terry, 23 Fla. 169.

There is no act of Congress or decision of a United States Court, authorizing a contract for the benefit of third parties, or putting that kind of construction upon this or any other contract, entered into by the United States, although this form of contract is in general use by the United States.

At the argument in the trial court, plaintiff expressly disavowed that the action was upon its contract with McDermott. The court below then stated that the action was clearly intended to be brought upon the bond for the breach of the contract with the United States, and after stating that it would be compelled to sustain the demurrer as to the bondsmen, said that it might be possible to spell out a cause of action against McDermott, upon what was stated as to the contract between plaintiff and him. Plaintiff's attorney thereupon stated that he would consent to the demurrer being sustained against McDermott also, as the action was intended to be brought against all on the bond, for the breach of the contract with the United States.

Dickinson, J. This is an appeal from an order sustaining demurrers of the defendants to the complaint. The cause of action set forth in the complaint may be briefly stated as follows:

The defendant McDermott entered into a written contract with the United States, an assistant quartermaster of the army making the contract in behalf of the government, by the terms of which McDermott undertook to erect certain buildings for the government at Ft. Snelling, he to furnish the material and labor therefor. It was specifically expressed by article three (3) of the contract that he should "be responsible for and pay all liabilities incurred for labor and material in fulfillment of this contract." In article six (6) it was agreed that "all rights of action, however, for any breach of this contract by the said John R. McDermott are reserved to the United States."

In connection with the making of this contract the defendant McDermott as principal, and the other defendants as his sureties, executed their bond to the United States in the penal sum of \$5,000, conditioned that McDermott should perform all the covenants, conditions, and agreements contained in the contract, to which the bond specifically referred, "including the covenant that the said John R. McDermott shall be responsible for and pay all liabilities incurred for labor and material in fulfillment of said contract."

The plaintiff, in reliance upon the terms and conditions of the contract and bond, furnished to McDermott at an agreed price a

large quantity of brick, which was used in the construction of the buildings, but for which payment was never made. The plaintiff now seeks to recover therefor in this action on the bond.

The legal question here presented—as to the right of the plaintiff, a stranger to the contract, to sue upon it—has recently been considered in Jefferson v. Asch, post, p. 446, (55 N. W. Rep. 604,) and the rule there declared is decisive of this case. The plaintiff has no right of action on the bond. He was a complete stranger to it. There was no privity between him and the promisee,—the United The latter rested under no duty or obligation to him upon which he could assert any legal or equitable right to avail himself of the benefit of, and enforce, the promise made by the defendants to the United States. Nor was the promiseethe United States-interested in having this part of the contract performed. It would be no benefit to the United States if the contractor should pay his own debts for material purchased by him. It would be in no way prejudiced if he should not pay. Its property could not be subjected to a lien therefor. the right of the plaintiff to sue upon this bond has no other legal foundation than the bare fact that the defendants had by that instrument entered into an obligation towards a mere stranger to the plaintiff that his debt should be paid. In such a case the stranger to the contract cannot sue upon it. Our decision above cited is decisive.

Orders affirmed.

VANDERBURGH, J., did not participate. (Opinion published 55 N. W. Rep. 606.)

GEORGE H. ORME vs. CHAS. C. MACKUBIN.

Submitted on briefs May 16, 1893. Decided June 6, 1898.

Contract Construed.

A contract by the defendant, upon whom rested no other obligation than that expressed, "to at once proceed to procure, and use all reasonable efforts to procure," from a specified person, a release of her interest in certain land, construed as not an absolute undertaking to procure the release, but only to make reasonable effort to do so.

Findings Supported by the Evidence.

Evidence held sufficient to show that this duty had been performed.

Appeal by plaintiff, George H. Orme, from an order of the District Court of Ramsey County, William Louis Kelly, J., made September 16, 1892, denying his motion for a new trial.

Morphy, Gilbert & Morphy, for appellant.

Alfred S. Hall, for respondent.

Dickinson, J. In 1884 the defendant acted as an attorney in fact for his mother, Ellen M. Mackubin, in effecting a sale to the plaintiff of certain city lots supposed to be owned by her. The sale was completed, Mrs. Mackubin conveying to the plaintiff by warranty deed; but at the same time, there appearing to be a defect in the title, the defendant entered into the undertaking with the plaintiff upon which this action is brought, wherein he (defendant) agreed "to at once proceed to procure, and use all reasonable efforts to procure, from Jane Milliken and the heirs of Samuel H. Wilkin, a release of any and all claim they, or either of them, have, or may have," to the lots which were then conveyed to the plaintiff. Within a few weeks after that the defendant did procure, and cause to be placed on record, a quitclaim deed of the premises to Mrs. Mackubin, the plaintiff's grantor, from Jane Milliken, and others, who were the heirs of Samuel J. Wilkin. It appears that they resided in the state of New York.

The procuring of this deed is claimed not to have constituted a performance of the defendant's agreement because Jane Milliken was a married woman, and her husband did not join in the deed.

Our view of the construction of the contract is in accordance with that of the court whose decision is here for review. The defendant did not undertake, absolutely, to procure the specified releases, but to "use all reasonable efforts" to do so. The meaning of those words is perfectly plain and certain, and they determine the meaning of the immediately preceding words, which, if standing alone, would be more uncertain. Read together, the sense is that the defendant would at once set about procuring such releases, and would use all reasonable efforts to accomplish that end. The language which we have italicized forbids construing the instrument as expressing an absolute undertaking to procure the releases.

The court found that the defendant did proceed at once in the matter, and that he used all reasonable efforts and diligence to procure the desired releases; and in this we deem the evidence to have justified the finding. It is urged that the defendant ought to have ascertained that Jane Milliken was married, and so have procured her husband's execution of the deed. It is true that the defendant caused a deed to be prepared and sent to New York to be executed, in which Jane Milliken was described as a widow, and that when the deed was returned and recorded the word "widow" had been erased. But, on the other hand, it is to be considered that the attorneys who examined the title for the plaintiff, and pointed out the defect, recommending the procuring of a deed from Mrs. Milliken, stated that she was a widow. And it seems that such was supposed to be the case until after her death. She had not lived with her husband for twenty years. The contract of the defendant, it will also be noticed, specified Jane Milliken, only, without mentioning her husband. It was at least questionable whether, under these circumstances, reasonable diligence required the defendant to make inquiry as to the fact concerning which the plaintiff's attorneys had thus advised the defendant. The court might well find that proper diligence had been exercised.

After the death of Mrs. Milliken, and the discovery that she was not a widow when the deed was made, the defendant went to New York, and endeavored to procure her surviving husband and heirs to release their claims to the entire tract (ten acres) of which these lots were a part. The undisputed evidence is that he of-

fered them a reasonable consideration therefor, but that they refused. The evidence justified the court in its conclusion that the result would have been the same if the defendant had sought a release of these lots only. We see no reason to doubt the correctness of the findings and conclusion of the court, and the order denying a new trial is affirmed.

Vanderburgh, J., did not take part. (Opinion published 55 N. W. Rep. 560.)

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CHARLES GASPER et al. vs. WILLIAM P. HEIMBACH.

Argued by appellant, submitted on brief by respondent May 17, 1893. Decided June 6, 1893.

Contract Construed.

A written contract for the sale of logs "boomed and delivered to tug" construed, in connection with the evidence, as meaning that the seller was to inclose the logs in a boom, so that a tug could fasten to them and tow them away.

Written Contract not Varied by Contemporaneous Oral Understanding.

A contemporaneous oral agreement to inclose the logs within a boom, and fasten the two separate ends of the boom to the shore, held incompetent, as being at variance with the written agreement.

Practice—Exception to Ruling Admitting Evidence, not Waived.

A party excepting to the admission of objectionable evidence does not waive his exception by subsequently moving that the evidence be stricken out, if such motion be not granted.

Appeal by defendant, William P. Heimbach, from an order of the District Court of St. Louis County, J. D. Ensign, J., made February 11, 1893, denying his motion for a new trial.

Duluth, Minn., Feb. 18, 1892.

Chas. Gasper, Chas. A. Peterson, Fond du Lac, Minn.

Gentlemen: I will give you eight (\$8) per M, Surveyor General scale, this district, for your logs marked "G. P." numbering about

1,800 pieces, boomed and delivered to tug. I will furnish you with chains necessary to boom them, payments to be made as follows, viz.: Eight hundred (\$800) dollars on the 22nd day of February, 1892, and note at ninety days without interest for four hundred (\$400) dollars, and balance to settle account July 1st, 1892, after date. It is agreed that you are to pay Surveyor General scale bills.

Yours truly,

W. P. Heimbach.

Accepted:

Chas. A. Peterson, Charles Gasper.

The plaintiffs, Charles Gasper and Charles A. Peterson received the \$1,200 mentioned in the foregoing contract, and brought this action to recover a balance of \$547.80, which they claimed due them for 1,761 logs containing 220,000 feet of lumber. The scale bill was \$12.20. The logs were at Fond du Lac, a few miles above Duluth, secured to the shore by a boom fastened to the shore at each end. Before the logs could be delivered to tug in the Spring after the ice broke up, the boom broke and the logs were carried down into St. Louis bay, and 705 pieces, estimated to contain 130,500 feet of lumber, were wholly lost. The contention in this case is, which party must sustain the loss.

The issues were tried November 11, 1892, before Judge O. P. Stearns, and plaintiffs had a verdict. A motion for a trial was made by consent before Judge J. D. Ensign, for the reason that Judge Stearns was sick and in Southern California.

White, Reynolds & Schmidt, for appellant.

The reason for the verdict against appellant is doubtless found in the testimony of Gasper to the effect that when he made the contract, shown by his acceptance, and just before the making of it, they told Heimbach that they would sell the logs to him where they lay, and he said all right, he would take them. This was clearly a variation of the written contract, and was objected to at the time when offered, and admitted over defendant's objection and exception. This was error, for which he is entitled to a new trial. City of Winona v. Thompson, 24 Minn. 199; Kessler v. Smith, 42 Minn. 494.

The property belonged to plaintiffs at the time of the loss. Before the logs were to be delivered to, and received by, the defendant, they were to be boomed and ready for delivery. They were never so boomed and ready for delivery. Simmons v. Swift, 5 B. & C. 860; Joyce v. Adams, 8 N. Y. 291; Rigler v. Hall, 54 N. Y. 167; Hoover v. Maher, 51 Minn. 269; Pike v. Vaughn, 39 Wis. 499; Gill v. Benjamin, 64 Wis. 362.

Cotton & Dibell, for respondents.

The substantial question to be determined by this appeal is, whether the respondents or appellant must bear the loss of the 705 logs which floated down the river and were not recovered.

When a party objects to the reception of evidence which is received over his objection, and he afterwards presses a motion to strike it out, which is granted, he will be held to have waived his objection and exception. Juergens v. Thom, 39 Minn. 458; Furst v. Second Avenue R. Co., 72 N. Y. 542.

The written memorandum did not purport to be a complete legal obligation, containing every material term and item of the agreement. It was merely a memorandum within the statute of frauds. Parol evidence could not be admitted to contradict the terms expressed in the writing. But as to other terms of the agreement, not contradictory of the terms expressed in the writing, parol evidence was competent. Beyerstedt v. Winona Mill Co., 49 Minn. 1; Domestic Sewing-Machine Co. v. Anderson, 23 Minn. 57; Boynton Furnace Co. v. Clark, 42 Minn. 335; Head v. Miller, 45 Minn. 446.

At the date of the agreement the logs were rolled in along the bank of the river and defendant had looked them over. He was to have all the logs then banked on the river. There had been a specific appropriation of the logs to the contract. The price had been agreed upon. The terms of payment had been settled, and \$800 in cash had actually been paid. Under these facts the title to the logs in question had passed to the appellant Heimbach. Rail v. Little Falls Lumber Co., 47 Minn. 422; Muskegon Booming Co. v. Underhill, 43 Mich. 629; Terry v. Wheeler, 25 N. Y. 520; Hatch v. Oil Co., 100 U. S. 124; Bethel Steam Mill Co. v. Brown, 57 Me. 9.

DICKINSON, J. These parties entered into a written contract for the sale, by the plaintiffs to the defendant, of a quantity of saw logs "boomed and delivered to tug." The purchaser was to furnish the sellers with chains necessary to boom them. The logs were on or at an island in the St. Louis river. The plaintiffs inclosed the logs in a boom, the two ends of which were fastened to the island, so that the boom did not completely surround the logs. While the logs were in this situation the boom broke, under circumstances concerning which the evidence was conflicting, and many of the logs were lost. The controversy in this action is as to which party should bear the loss; and that depends upon the question whether the plaintiffs had done all that was required of them under the contract; whether they were still in possession and control of the logs, or whether the same had been delivered to, and were under the control of, the defendant.

The evidence on the part of the plaintiffs, as well as on the part of the defendant, showed, and without contradiction, that, as applied in business of this kind, the language of the contract, "boomed and delivered to tug," signifies that the logs are to be completely inclosed in a boom, so that a tug can fasten to them and tow them away: and even without such evidence this would seem to be the meaning of that language of the contract. At the trial one of the plaintiffs was allowed to testify to a conversation between themselves and the defendant, at or prior to the making of the written contract, as follows: "We said we would sell the logs right to him on the spot where they lay, but we would take no more responsibility after he had bought them. We would put in the chains, and tie them to the shore; and that is the way we wanted to sell them. He said, 'All right, I will take-"." At this point the witness was interrupted by a motion on the part of the defendant to strike out the evidence, and the sentence was not completed; but the witness had stated so much that the jury would probably understand the testimony as indicating that the defendant accepted the terms thus proposed. All this evidence was properly objected to. for the reason that it was at variance with the written contract. The objection was well founded. Particularly that part of this evidence which we have put in italics went to vary the written

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agreement of the plaintiffs that the logs should be "boomed and delivered to tug." The obvious purpose and tendency of the testimony was to show that the plaintiffs' undertaking was only to do what they had done,—inclose the logs within a boom, the two separate ends of which should be fastened to the shore. The written contract expressed a different obligation.

The contention that this error was waived or cured by the motion of the defendant that the evidence be stricken out, and by the ruling of the court thereon, cannot prevail. The court did not strike out the objectionable testimony. The most that can be said in support of the respondents in this particular is that the court left it entirely uncertain whether any of the testimony was stricken out, and what, if any, was thus excluded. The exception to the reception of the evidence was well taken.

It may be assumed that, by moving to have the evidence stricken out, the defendant consented to that mode of remedying the error, so that, if his motion had been granted, the defendant would have been deemed to have waived his previous exception; but, as that remedy was not granted, he cannot be supposed to have relinquished his exception to the admission of the evidence, even though he did not except to the ruling of the court on his motion.

Our conclusion is not affected by the fact that, when the defendant was about to send to have the logs taken down the river, he concluded to dispense with the use of a tug, and to employ men to float the logs, within the inclosing boom, down the river. There does not appear to have been any modification of the conditions of the written contract as to the manner in which the plaintiffs should boom the logs for delivery; at least, it is not clear that there was any modification or waiver of the agreement in this particular.

Order reversed.

Vanderburgh, J., absent. (Opinion published 55 N. W. Rep. 559.)

STATE OF MINNESOTA vs. FRANK C. BANNOCK.

Argued May 15, 1893. Decided June 6, 1893.

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Trial by Jury may be Waived

One accused in the municipal court of the city of Duluth of a criminal offense within the jurisdiction of justices of the peace may waive the right of trial by jury.

If Waived it cannot be Recalled at Will.

The right, having been waived, cannot be recalled at will.

Frank C. Bannock was accused of larceny and convicted in the Municipal Court of the City of Duluth. Questions of law arose on the trial which, in the opinion of the court, were so doubtful as to require the decision of this court. The defendant desiring it, the case was reported so as to present the questions and certified here. 1878 G. S. ch. 117, § 11; Sp. Laws 1891, ch. 53, § 46.

The defendant was accused of stealing a toy rocking-horse worth \$9.95, from Panton & Watson. He was arrested and brought into court on December 26, 1892. He pleaded not guilty, and thereupon the Judge explained to him his right to a trial by jury. He then waived trial by jury, and the hearing was adjourned to December 30, 1892. On that day defendant appeared and asked leave to withdraw his waiver of a jury trial, and demanded to be tried by jury. The court refused to permit defendant to withdraw his waiver of a jury trial, and he excepted to the ruling. He was then tried before the court and found guilty and fined \$25 and costs. Defendant asked for a stay of proceedings for twenty days, and it was granted. On January 14, 1893, he moved for a new trial, which was denied, and on January 21, 1893, the questions were, at his request, certified to this court by Eric L. Winje, Special Judge. See State v. Woodling, ante, p. 142.

Edson, Edson & Campbell, for the defendant.

The right of trial by jury is a constitutional right which cannot be waived by the accused in criminal cases, except in minor offenses provided for by statute. Mays v. Commonwealth, 82 Va. 550; Ford v. Commonwealth, 82 Va. 553; State v. Carman, 63 Iowa, 130; Hill v. People, 16 Mich. 351; State v. Maine, 27 Conn. 281; Bond



v. State, 17 Ark. 290; League v. State, 36 Md. 259; State v. Holt, 90 N. C. 749; Williams v. State, 12 Ohio St. 622; People v. Smith, 9 Mich. 193; United States v. Taylor, 11 Fed. Rep. 470.

Defendant had a right to demand a jury any time before trial, even though he had previously waived the same. Const. Art. 1, § 6, gives the accused until the trial is actually commenced in which to demand a jury. Brown v. State, 89 Ga. 340.

The Attorney General and Henry F. Greene, for the State.

As to the right of the defendant, charged with having committed a misdemeanor, to waive a trial by jury, see Ward v. People, 30 Mich. 116; Lavery v. Commonwealth, 101 Pa. St. 560; Darst v. People, 51 Ill. 286; Connelly v. State, 60 Ala. 89; State v. Borowsky, 11 Nev. 119; Logan v. State, 86 Ga. 266; Sarah v. State, 28 Ga. 576; People v. Goodwin, 5 Wend. 251; Langbein v. State, 37 Tex. 162; State v. Moody, 24 Mo. 560; Dillingham v. State, 5 Ohio St. 280.

If the right to a jury is waived in a civil case, it cannot be asserted when the cause is called for trial. St. Paul Distilling Co. v. Pratt, 45 Minn. 215.

DICKINSON, J. In the municipal court of the city of Duluth the defendant was accused of the crime of larceny of the grade of a misdemeanor. He interposed a plea of not guilty, and waived a trial by jury. The cause was then adjourned to a subsequent day, at which time the defendant asked leave to withdraw his waiver of a trial by jury, and he then demanded a jury trial. This was refused; the judge proceeded to a trial without a jury; the defendant was found guilty, and a fine of \$25 and costs was imposed. The case is certified to this court, under the statute, for our opinion upon the questions (1) whether the defendant could effectually waive his right to a jury trial, and (2) whether, having declared such waiver, he could afterwards revoke it, and demand a trial by jury.

1. The reasons upon which our decision in State v. Woodling, ante, p. 142, (54 N. W. Rep. 1068,) was founded, are decisive of the first of the questions above stated. In that case it was considered,

with respect to offenses within the jurisdiction of justices of the peace, that the constitution does not require that trials shall be by jury; that, if the accused cannot effectually waive his right of trial by jury, it is only because public policy forbids it; and that public policy does not forbid this, as respects such offenses. The statute, long in force, expressly authorizing the accused in a justice's court to waive a trial by jury, was considered as strongly expressive of what is public policy as to this matter. We held that one accused, in the municipal court of Minneapolis, of an offense within the jurisdiction of a justice of the peace, might waive his right to trial by jury.

The same reasons control the decision of this case. The offense charged was within the jurisdiction of justices of the peace. the trial had been in such a court, there could have been no doubt that the right might be waived. The municipal court was by law invested with the same jurisdiction, in criminal matters, as that belonging to justices of the peace. Sp. Laws 1891, ch. 53, § 1, subds. 8, 9, p. 596. We deem it unimportant that elsewhere (section 40 of the same law) it is provided that trial by jury in this court shall be "conducted" as in the district courts, and that all laws of a general nature applicable to jury trials in the district court shall apply to this court, except as otherwise provided. Indeed, if this prosecution had been by indictment in the district court, we think that the accused might have waived his right of trial by jury. In view of the reasons above referred to, it can make no difference whether the trial is in a justice's court or in some other court having jurisdiction.

2. The right of trial by jury having been voluntarily relinquished, the accused had no power to revoke his waiver, and demand a trial by jury. It would be a self-contradiction to say that the right, once expressly and effectually waived by the defendant, could be recalled at his mere will. The right to thus revoke is inconsistent with the essential nature of a waiver.

Judgment affirmed.

Vanderburgh, J., absent. (Opinion published 55 N. W. Rep. 558.)



O. W. Saunders vs. James Gallagher.

Argued by appellant, submitted on brief by respondent, May 18, 1893. Decided June 8, 1893.

Verdict Sustained by the Evidence.

Evidence held sufficient to sustain the verdict.

Evidence of Value in Corroboration.

When the evidence is conflicting on the question whether a certain price was orally agreed to be paid for doing certain work, evidence of the value of the work is admissible. Kumler v. Ferguson, 7 Minn. 442, (Gil. 851;) Schwerin v. De Graff, 21 Minn. 354; and Miller v. Lamb, 22 Minn. 43,—followed.

Appeal by plaintiff, O. W. Saunders, from an order of the District Court of Carlton County, O. P. Stearns, J., made January 14, 1893, denying his motion for a new trial.

Between December 17, 1889, and June 5, 1890, James Gallagher, the defendant, cut, hauled and banked on St. Louis River, a quantity of saw-logs for the plaintiff. The question in dispute between them was whether defendant agreed to do this work for \$3.25 per thousand feet and pay all expenses, as claimed by plaintiff, or was to have \$1,000 for his personal services and be repaid all his expenditures in the business, as claimed by defendant. This question was the only matter submitted to the jury, and they found there was no agreed price per thousand feet; but found there was an agreement between the parties by which defendant was to act as foreman for the plaintiff at an agreed price for his services. To corroborate his claim, defendant was permitted to prove that the work was worth more than \$3.25 per thousand.

White, Reynolds & Schmidt, for appellant.

W. H. Hammons, for respondent.

GILFILIAN, C. J. The evidence on the issue in the case was conflicting, the two parties testifying directly contrary to each other. The testimony of plaintiff was to some extent corroborated, but it left a fair question for the jury to determine which was the true account, and we can easily see how, from the appearance and demeanor of the witnesses, and their manner of testifying, the jury

might credit defendant rather than plaintiff. Their decision is final.

The plaintiff having testified that defendant accepted his offer of \$3.25 per M. for doing the work, the defendant having squarely testified to the contrary, evidence of the value of the work was admissible, as it would tend to show which was the more credible statement. Kumler v. Ferguson, 7 Minn. 442, (Gil. 351;) Schwerin v. De Graff, 21 Minn. 354; Miller v. Lamb, 22 Minn. 43. What it cost in fact to do the work was not admissible, for, in the nature of things, neither party could know it when they made their contract. The question calling for a statement of the cost was objectionable; but the witness did not answer responsively to the question, but, instead, stated the value of the work.

Order affirmed.

Vanderburgh, J., took no part in the decision.

(Opinion published 55 N. W. Rep. 600.)

In re Minnehaha Driving-Park Association of Minneapolis, Insolvent.

Submitted on briefs May 23, 1893. Decided June 8, 1898.

District Court may Make Calls upon Unpaid Stock of Insolvent Corporation.

In proceedings under Laws 1881, ch. 148, upon an assignment by a corporation for the benefit of its creditors, the court may make or direct calls upon the unpaid subscriptions to stock subject to call.

Same-Effect of Such Call.

Such a call does not determine the liability of stockholders, but only makes due and payable whatever they may be liable for under a call, so that suit may be brought for it.

Same-Conditions under Which a Call may be Made.

The authority of the court to call in unpaid subscriptions depends on the necessity of applying them to payment of debts.

Proof of Claims under Laws 1881, ch. 148.

Under that chapter, proof of claims against the insolvent is, in the first instance, to be made to the receiver or assignee, and his decision upon them, if acquiesced in, is final.



Review of Allowance of a Claim.

When he allows a claim, the debtor or other party interested in the assets, or their distribution, may, before the decision of the receiver or assignee has become final by acquiescence, apply to the court for, and is entitled thereupon to have, a judicial examination and decision of such claim.

Same-Practice on Such Review.

But it must be applied for in a direct proceeding, and not as a part of, or collateral to, some other proceeding, such as a proceeding to authorize a dividend, or to call in the assets.

Appeal by Chester B. Dickens and seven others, stockholders of the Minnehaha Driving-Park Association of Minneapolis, from an order of the District Court of Hennepin County, Seagrave Smith, J., made October 6, 1892.

The Minnehaha Driving-Park Association was a corporation organized April 4, 1888, with a capital stock of \$50,000, divided into shares of \$50 each. On October 19, 1891, the corporation being insolvent, made a general assignment of its property to Wayland B. Augir, in trust for its creditors. On August 18, 1892, the assignee presented to the District Court his petition stating that the assigned property had been converted into money and was insufficient to pay the claims; that the capital stock was fully subscribed by about two hundred and twenty different persons, who agreed to pay therefor as called for by the board of directors; that only seventy per cent. upon the stock was called for by the board; but some of the stockholders had voluntarily paid their stock in full, so that only \$13,335 remained unpaid; that claims against the corporation had been filed with the assignee to the aggregate sum of \$8,906.73: that many of the stockholders were insolvent, or dead, or removed from the state to parts unknown, and that not more than one-half of the unpaid subscriptions were collectible. He asked the court to order a call of the unpaid balance on the stock. Dickens and his seven associate stockholders appeared and opposed the application, claiming that the power to make calls rested only in the board of directors, and not in the court; that the claims against the corporation were invalid, and were contracted in violation of the articles of incorporation, and that there was still \$8,713 uncollected on calls made by the board of directors prior to the assignment.

They asked the court to refuse the application, or, in the alternative, to order the holders of claims to prove their demands in some appropriate manner, before any call should be made on the stockholders for money to pay them.

The court granted the petition of the assignee and adjudged that all of the money subscribed for the capital stock of the corporation, and remaining unpaid and collectible, was required for the payment of its valid debts, and directed the assignee to call upon the stockholders for payment, and directed them to pay within ten days after service of a copy of that order.

Dickens and his associates appealed from the order to this court.

A. M. Harrison and Jamison, Penney & Hayne, for appellants.

What we chiefly complain of in this proceeding is the action of the court in making this order, calling upon the stock subscribers to pay over to the assignee \$13,335 in addition to \$8,713 due upon former calls, without ascertaining that there were any debts of the defunct corporation rendering it necessary to make a call upon this fund. The board of directors, before insolvency, may make calls to meet running and operating expenses, and for the purpose of carrying on the business, but this power the court does not possess. It has only power to make calls to pay the legal debts of the corporation. The great body of the pretended claims could not have been established had they been examined into by the court. was the duty of the court to first ascertain what the liabilities of the stockholders were, before any call could be made. Scovill v. Thayer, 105 U.S. 143; Chandler v. Keith, 42 Iowa, 99; American Ins. Co. v. Schmidt, 19 Iowa, 502; Mann v. Pentz, 3 N. Y. 415; Cook, Stock & S. §§ 111, 208; Adler v. Milwaukee Pat. Brick Mfg. Co., 13 Wis. 63; Citizens' Bank & T. Co. v. Gillespie, 115 Pa. St. 564.

This proceeding cannot be maintained, because it is not the proceeding pointed out by our statute for enforcing a liability against stockholders for unpaid stock. This liability can only be enforced after judgment against the corporation and execution returned unsatisfied. 1878 G. S. ch. 34, §§ 9, 10, 11; ch. 76, §§ 17 to 23, incl.; Cook, Stock & S. § 200; Johnson v. Fischer, 30 Minn. 173; Allen v.

Walsh, 25 Minn. 543; Priest v. Essex Mfg. Co., 115 Mass. 380; Handy v. Draper, 89 N. Y. 334.

The assets of the corporation must be exhausted, or clearly shown to be insufficient, before any resort can be had to the unpaid stock subscriptions. The liability of the corporation is the primary one, and that of the stockholders only secondary. Harper v. Union Mfg. Co., 100 Ill. 225; First Nat. Bank v. Greene, 64 Iowa, 445; Wright v. McCormack, 17 Ohio St. 86; Lane v. Harris, 16 Ga. 217; Jackson v. Meek, 87 Tenn. 69; Drinkwater v. Portland Marine Ry. Co., 18 Me. 35; Dauchy v. Brown, 24 Vt. 197.

Byers & Augir, for respondent.

The appellants assume that there has been no determination of the amount or validity of the claims of creditors against the insolvent company. The records in the District Court show an order of the court directing creditors to verify and file their claims with the assignee, the publication of the notice thereof, and the allowance by the assignee of claims to the amount mentioned in the petition. In re Rees, 39 Minn. 401; In re Mann, 32 Minn. 60.

If the assignee wrongfully disallows a claim, the creditor has his remedy under Laws 1881, ch. 148, § 8. If the assignee allows a claim which is unjust, any person interested can have the matter reviewed by the court directly, by proceedings under § 10. It is not the proper remedy of a stockholder in such a case to first appear upon the scene and resist the efforts of the assignee to collect the assets of the insolvent. His remedy is not a negative and obstructive one, but a direct proceeding under § 10 of the insolvent law, and that proceeding can be instituted at any time before the distribution of the insolvent's assets among its creditors. Until such direct proceeding is instituted by a party in interest, the business of collecting the assets of the insolvent and of distributing the proceeds in payment of claims allowed by the assignee is to take its usual course. Perry v. Murray, 55 Iowa, 416.

In none of the cases cited by appellants had there been any determination by an assignee or receiver of the amount or validity of the debts of the insolvent at the time the collection of unpaid stock subscriptions was sought to be enforced, except in Scovill v.

Thayer, 105 U.S. 143, but in that case the other assets of the corporation had not been exhausted.

1878 G. S. ch. 76, is not adapted to the circumstances of this case. Here the corporation has made a voluntary assignment. *Marson* v. *Deither*, 49 Minn. 423.

GILFILLAN, C. J. This is an appeal from an order of the district court making a call upon the unpaid subscriptions to the stock of a corporation, in proceedings upon an assignment by such corporation for the benefit of its creditors.

The return is somewhat short in several particulars. It does not disclose distinctly whether the assignment was under 1878, G. S. ch. 41, or Laws 1881, ch. 148, but we infer that it was under the latter. It does not make it appear very satisfactorily at what stage of the proceedings the assignee applied to the court to make or direct the call; that is, what had been done in the proceedings prior to the application. But we infer that the claims to satisfy which the call was applied for had been presented to, and allowed by, the assignee, or accepted by him as valid, and that nothing else had been done in respect to them.

When a court has charge, through its receiver or assignee, of collecting and converting the assets of a corporation, and applying the proceeds to the satisfaction of its debts, the court's call for the unpaid subscriptions to stock stands precisely as does a call made by the directors of an operating corporation. Such a call does not determine absolutely the liability of the stockholders. It has not the effect of a judgment. Its effect is to make whatever the stockholders are liable for, within the call, become due and payable, so that suit may be brought to enforce such liability. Though the order, in this case, directs the stockholder to pay the unpaid subscriptions within ten days after they shall be called for by the assignee, it has no other effect.

There can be no question of the power of the court, in insolvency proceedings, under Laws 1881, ch. 148, to direct the collection of unpaid subscriptions, and the application of the proceeds in payment of the debts of the corporation. What remains unpaid on the subscriptions are debts due the corporation, and are its assets. When it is insolvent, they constitute a fund for the payment of its

debts. It is true that, as the primary purpose of the proceedings in insolvency is to apply the assets to payment of the debts, the power of the court to make or direct calls for the unpaid subscriptions, and direct the enforcement thereof, must be limited to cases where it is necessary to resort to that fund for the purpose, and the extent of the call must be determined by the amounts of the debts and of the other assets.

According to the petition of the assignee, on which the application for the call was made, from the other assets not more than \$200 can be realized; and this seems admitted by the answer of the objecting stockholders, and it also seems admitted that the aggregate of the unpaid, uncalled subscriptions is \$13,335, and of the claims filed with the assignee, \$8,906.73. The assignee alleges in the petition that so many of the stockholders are insolvent, others being dead, and leaving no estate, and many having left the state, and gone to parts unknown, that he believes not more than one-half of the amounts unpaid on the stock are collectible. answer does not attempt any showing as to this, but it alleges that, upon calls made by the directors before the assignment, there is uncollected \$9,178, which is good and collectible. In response to this allegation the assignee states in an affidavit that, as attorney for the corporation before the assignment, and, since then, as the assignee, he has many times demanded payment of such unpaid subscriptions, and has endeavored to collect all thereof, and that all the subscribers refuse to pay, claiming that they owe the corporation and its assignee nothing; that nearly all whom he considers responsible have been sued, and the actions are now pending; that the amounts are so small that in only two or three cases can statute costs be recovered; and that the costs and expenses of recovery will absorb a large part of the proceeds.

The answer also disputes the validity of the claims filed with the assignee, and asks that the holders thereof be required to prove their claims, and that the court, before making a call, ascertain what, if any, claims there are, having any legal or equitable right to be paid by a call upon the subscribers to stock.

Assuming that a case was made for a call, we think it was proper to make it for the whole of the unpaid subscriptions. It was the duty of the court, so far as it could do so, to make the coll

produce enough to pay the debts of the corporation, and, in determining how much it might be necessary to call for, to take into account that a call upon some subscribers would, either from death, insolvency, removal from the state, or other causes, produce nothing, and that to enforce the call upon others would be attended with costs and expenses large in comparison with the sums collected. It had information enough to justify it in concluding that, to produce net the amount required to pay all the claims filed with the assignee, it was necessary to call in all the unpaid subscriptions, so far as they could be collected.

But the chief objection to the call is that the claims against the corporation had not been ascertained and determined, and, as we understand the appellants, that upon the application for the call the court ought to have first proceeded to ascertain and determine those claims, making it a part of the proceedings to determine whether the call should be directed.

Whatever may be the proper mode for finally determining the validity of claims against the estate of an insolvent assignor, it would seem that the orderly way would be by a direct proceeding for that purpose alone, not making it collateral to some other proceeding, as, for instance, to an application for an order directing a dividend among the creditors, or to any proceeding for collecting the assets.

The consideration of how the claims shall be determined in insolvency proceedings requires an examination of some of the provisions of the act of 1881, ch. 148. That act was so badly drawn that, in order to prevent it failing altogether, we have frequently been obliged to apply to it the most liberal rules of interpretation, and to derive from it by implication meanings which its terms failed directly to express. The matter of the proof of claims is one of those upon which the terms of the act are inadequate. intends that a claim shall be presented to, and, in the first instance, allowed or disallowed by, the assignee or receiver. Section 8: "Any creditor whose claim is disallowed in whole or in part by any assignee or receiver appointed or selected under this act, or under the provisions of the assignment laws of this state regarding the assignment of debtors, may appeal from such disallowance to the district court, and there have such claim tried as other civil ac-The section then provides how, and within what time, such tions."

appeal shall be taken. What is to be done by a creditor to secure a judicial hearing in case of a disallowance is clear enough. there is in the act no express provision securing such a hearing to the debtor, or to any person interested in the assets and their distribution, when the assignee or receiver improperly allows a claim. Yet it is hardly conceivable that the legislature intended the decision of the assignee or receiver—an administrative, and not a judicial, officer-to finally and conclusively determine the rights of any of the parties interested, except by their consent. should determine them in the first instance, and that his determination should become final, through the acquiescence of the parties, is well enough, and the act undoubtedly intends as much. as the act makes no direct provision for a judicial hearing upon claims except at the instance of a creditor whose claim is disallowed in whole or in part, the authority and duty to provide such a hearing, when asked for by others, may be found in the general power of the court over the insolvency proceedings,—a power large enough to secure their just rights to all parties interested. power given it over the matter of proof of claims is sufficient for the purpose. Section 2 provides, among other things, for distribution among creditors who shall file releases, and "who shall come in and prove their respective claims within such time, and in such manner, as the court or judge shall direct." This, of course, is to be taken in connection with the manifest intent of the act, that the proof in the first instance is to be made to, and passed on by, the assignee or receiver, and that, if acquiesced in by all interested, his decision is to be final. The clause authorizes the court to direct what proofs shall be presented to the assignee or receiver, but the court's power in the matter of proving claims cannot stop there. It must extend to giving to parties interested (where not expressly given by the act) an opportunity to prove or disprove claims upon a judicial examination, and have such claims determined in a judicial way.

We do not know what general rules the district court has on the subject, but we shall assume that it either has general rules adequate to give a complaining party proper redress against an erroneous allowance of a claim, or, if it has no such general rule, that it would, upon seasonable application, make such order as would

give such party an opportunity for a judicial examination of the claim.

As we have said, we assume that the claims mentioned in the petition were allowed by the assignee, and, as it does not appear that any proper application has been made for a judicial hearing upon them, it is to be deemed that the allowance has been acquiesced in, and become final. An application by the assignee for leave to call in the assets is not a proceeding in which it is proper to institute what would be, in effect, an appeal from the assignee's allowance of claims.

Order affirmed.

Vanderburgh, J., took no part. (Opinion published 55 N. W. Rep. 598.)

WILLIAM H. BURNS et al. vs. ALBERT S. PHINNEY et al.

Argued by appellants, submitted on brief by respondents, May 8, 1898. Decided June 8, 1898.

Courts cannot Enlarge the Time to Appeal.

Neither the district court nor this court can give a party a right to appeal after the time for appeal prescribed by the statutes has passed.

One Having no Interest will not be Heard.

One who claims no interest in the subject of controversy cannot be heard on appeal to this court.

A Lien Claimant is Barred of His Lien, if He is not in Court within a Year.

Where a lien claimant, made a defendant in an action to foreclose a mechanic's lien, does not appear in it for the purpose of asserting his lien, within the time allowed him by statute to bring an action to enforce his lien, his right to enforce it is barred. That the action is brought within time to save plaintiffs' lien will not help such a defendant.

Same — If Made Defendant, and He Set up His Lien, the Action is His.

Where a lien claimant appears in such an action for the purpose of asserting his lien he makes the action his own for the purpose of enforcing his lien, and if he is in time the fact that plaintiffs' lien is barred, or that plaintiffs from any cause fail to recover, will not affect him.

Findings not Supported by the Evidence.

Finding of fact held not justified by the evidence.

New Trial Ordered.

Judgment reversed, and new trial ordered as to plaintiffs and defendants Grier and Wilcox, and affirmed as to defendant Horst.

Appeal by defendants, Charles J. Berryhill and others, from a judgment of the District Court of Ramsey County, J. J. Egan, J., entered May 7, 1892.

The plaintiffs, William H. Burns and Willis R. Shaw, commenced this action to foreclose their lien for lumber sold to Albert S. Phinney and Mamie Phinney, his wife, and used in the construction of six cottages, on a tract of land less than one acre in extent, situate on the corner of Marshall Avenue and Victoria Street in St. Paul. Other lien claimants and mortgagees were made defendants. The issues were tried April 19, 1892. Findings were filed and judgment entered directing a sale of the property and distribution of the proceeds among the lien claimants; the excess, if any, to be brought into court for distribution to the parties entitled, as their respective rights might appear. The mortgagees appeal.

Charles J. Berryhill, for appellants.

Frank Ford and Howard L. Smith, for respondents.

GILFILLAN, C. J. This is an action to enforce a mechanic's lien, and, as in most actions of the kind, matters are a good deal complicated. So far as the record in this appeal discloses, the owners of the real estate, Mamie Phinney and Albert S., her husband, made no defense. Defendants Berryhill defended under one mortgage, defendants Davison under another, and defendant Goodman under another, and defendant Resser defended under the Davison mortgage. As to each mortgage it was claimed, although subsequent to the mechanics' liens, that it was entitled to preference over them. Defendant Horst claimed a mechanic's lien, and defendants Grier and Wilcox did the same.

The liens of plaintiffs, of Horst, and of Grier and Wilcox were allowed. The judgment directed the property sold to pay them, and the claims of the other defendants to be barred, except their rights of redemption. The appeal is brought by the Berryhills, the Davisons, and Good-man.

After his time to appeal had expired an application was made to the court below on behalf of Resser to be permitted to join in the appeal taken by the others, and a similar application is made here. There is no authority in the district court nor in this court to give a party a right to appeal after the right given him by the statute has lapsed by his failure to exercise it, and to grant his application would be, in effect, giving him a right to appeal. See 1878 G. S. ch. 66, § 79.

The mortgage executed by the Phinneys to Davison was, as appears from his answer, by him assigned to Resser, and thereupon his interest in the subject of litigation ceased, and consequently he has no right to complain of the decision of the court below, and cannot be heard here.

The dates of the mechanics' liens were as follows: Plaintiffs', July 16, 1890; Horst's, September 12, 1890; Grier's and Wilcox's, October 15, 1890.

The mortgage under which Goodman claims was executed December 4, 1890, by the plaintiffs to the National Investment Company, and by that company assigned to Goodman.

No reason is apparent upon the record, and none is suggested in the appellant's brief, why the lien of this mortgage is not subordinate to the mechanics' liens; therefore the eighth assignment of error, directed to the decision giving the mechanics' liens precedence of that mortgage, is not well founded.

The mortgage of the Phinneys to Berryhill was executed December 5, 1890. No assignment of error calls in question the decision of the court subordinating this mortgage to the mechanics' liens, and it is therefore unnecessary to consider it.

The defendants Grier and Wilcox were named as defendants in the summons and complaint, but they did not appear in the action till they filed their answer, March 5, 1892, more than a year and four months after the date of their last item. Their right to enforce their lien had then become barred. The fact that plaintiffs commenced their action in time did not keep the Grier and Wilcox lien alive. When an action to foreclose a mechanic's lien is begun, the appearance in it of other lien claimants for the purpose of asserting

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their liens is equivalent to the commencement by them of an action for the purpose, and if within the time allowed them to commence an action will preserve their right to enforce their liens.

Horst's answer was filed before his lien was barred, and, so far as he was concerned, it was immaterial whether plaintiffs commenced the action in time to save their lien. When the action is to foreclose a mechanic's lien, the right of a lien-claiming defendant does not depend on the plaintiff's right to recover, nor on his recovery. The failure of plaintiff to recover from any cause will not affect the right of any lien-claiming defendant. Each such defendant makes the action his, for the purpose of enforcing his lien. from the moment he appears in it for that purpose.

We think the court below was justified in finding that the plaintiffs' action was commenced in time to save their lien.

From assignment of error 5, "in refusing to find a lien in favor of Goodman for the amount of his mortgage," and a similar one (7) in respect to the Berryhill mortgage, it is difficult to see what the appellants complain of. The court found the existence of those mortgages, and in its direction for judgment recognized the right of those defendants to redeem. We infer the assignments were intended to present the point that the court ought to have directed a sale on account of those mortgages as well as of the liens, and allowed those defendants to participate in the distribution of the proceeds of sale. It is probably a sufficient reason for the court not so directing that those defendants did not ask for any such Their answers merely put them in the attitude of resisting the mechanics' liens. The mortgage of Goodman was not due; whether Berryhill's was or not nowhere appears. Those defendants may have preferred to retain their liens, take the chances of the owners redeeming, and redeeming themselves in case they did But the findings of fact were not sufficient to justify any such The amounts still due on the mortgages were not found, direction. and the court was not asked to make any such findings.

The court, however, erred in finding as a fact that the plaintiffs' claim was not paid. The evidence was such as to require a finding that it was paid December 5, 1890. Upon the transaction which constituted payment there was no conflict in the evidence. It is true, Burns testified generally that no part of the claim had been

paid, but, as he had no personal knowledge of that transaction, his general statement could make no conflict in the evidence upon it. The transaction was that Phinney, having given to Burns & Shaw two orders on Berryhill and Davison,-one for the payment of the balance due on house No. 2, Berryhill & Davison's rearrangement; the other for payment of the balance due on house No. 4 of said rearrangement,-the orders were taken by one Othea, an agent of Burns & Shaw, to Berryhill, who paid the same. The latter testified. and he was corroborated by Othea, and in no way contradicted, that at the time of paying he told Othea distinctly a number of times that the houses on which he was paying were those on lots 2 and 4, being the second and fourth houses from the corner. The house on lot 4, or the fourth one from the corner, was that in controversy Of course, as the party paying has the right, ordinarily, to make the application of the payment, it must be accepted, and must operate as if so applied.

The way in which the misunderstanding must have arisen was The land platted as Berryhill & Davison's rearrangement was situate at the corner of Marshall avenue and Victoria street, St. Paul, and was divided by the plat into six lots, one (No. 6) fronting on Marshall avenue, the others fronting on Victoria street, and numbered consecutively, beginning with the corner lot, Nos. 1, 2, 3, 4, and 5. The Phinneys built at about the same time a house on Because the house on lot 6 was built first, and the others in succession, beginning at the corner, those working on the houses, and the plaintiffs also, were in the habit of designating the houses, not according to the numbers of the lots, but according to the order in which they were built, thus designating that on lot 6 as house 1, and that on lot 1 as house 2, and so on. It does not appear that Berryhill knew anything of that way of designating the houses. is easy to see how the plaintiffs, and, on the trial, the court below, may have been misled by this manner of designating the houses.

The judgment must be reversed, and a new trial ordered, as between the plaintiffs and the defendants Grier and Wilcox and the defendants the Berryhills and Goodman, and affirmed as to the defendant Horst.

VANDERBURGH, J., took no part in this decision. (Opinion published 55 N. W. Rep. 540.)

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ELLEN MAGNER vs. WILLIAM H. TRUESDALE.

Argued May 15, 1898. Decided June 8, 1898.

Care Required in Crossing a Railroad Track.

Held, that one attempting to cross a railroad track at a street crossing without looking to see if there is danger, when there is nothing to prevent his looking, and when, by looking, he must have discovered the danger in time to avert it, is guilty of negligence.

Contributory Negligence Barring Recovery.

Held, that the evidence shows such negligence, and that defendant was entitled to the verdict rendered, so that any error in the charge was harmless.

Appeal by plaintiff, Ellen Magner, as administratrix of the estate of Edmund Magner, deceased, from an order of the District Cou of Hennepin County, *Thomas Canty*, J., made August 26, 1892, denying her motion for a new trial.

On December 18, 1889, about nine o'clock in the forenoon, Fd. mund Magner, since deceased, was walking west on the south of Elm Street and crossing the track of the Minneapolis and St. Louis Railway Company. The track of the railway runs north and south through that city. The railway was in the hands of the defendant, William H. Truesdale, Receiver appointed June 28, 1888, by the District Court of Hennepin County. The employes were making a flying switch. The engine came from the south and, at the north line of Elm Street, passed onto a side track. it was a freight car going north. When the engine had passed, Magner stepped onto the track behind it to cross over, and was struck by the freight car, run over and so seriously injured that he died the next day. The plaintiff was on January 20, 1890, appointed administratrix of his estate and on obtaining permission, brought this suit against the Receiver, under 1878 G. S. ch. 77, § 2, as amended by Laws 1889, ch. 109, to recover \$10,000 on account of the negligence of the Receiver's employes in making a flying switch across a public street in the city. The defense was, that deceased was plainly guilty of contributory negligence, in not looking up the track to the south, before attempting to cross. The issues were tried June 23, 1892. Defendant had a verdict.

John Moonan, for appellant.

The making of a flying switch at the time, and in the manner this one was made, was such gross negligence and carelessness upon the part of defendant's servants and agents, that no amount of contributory negligence would bar a recovery. Schindler v. Milwaukee, L. S. & W. Ry. Co., 87 Mich. 400; Alabama & V. Ry. Co. v. Summers, 68 Miss. 566; Louisville & N. Ry. Co. v. Pott's Adm'r, 90 Ky.

Albert E. Clarke and Wilbur F. Booth, for respondent.

Appellant's proposition is, that the defendant's agents were so negligent that no contributory negligence on the part of decedent, will bar a recovery. This does not, in our judgment, require discussion in this court. Elliot v. Chicago, M. & St. P. Ry. Co., 5 Dak. 523; Texas & N. O. Ry. Co. v. Brown, 2 Tex. Civ. App. 281.

GILFILLAN, C. J. Action for negligently injuring, and causing the death of, plaintiff's decedent, Edmund Magner.

The Minneapolis & St. Louis Railway, of which defendant was receiver, and in the management, runs nearly north and south upon and along Mill street, a public street in the city of Waseca, and crosses Elm street, also a public street in said city. From some distance south of Elm street the track is upon a slightly descending grade to and across that street, and to the north of it there is a switch track. Those in charge of the railway switched cars from the south side of the street by running them across to and upon the switch track, or ran them along the main track north of the street, while the engine doing the switching ran upon the switch track to let them pass. At the time of the injury the railway employes were making, from the south to the north side of Elm street, what is called a "flying switch," that is, one made by attaching to the car to be switched an engine giving the car a sufficient impetus, and then detaching the engine, running it ahead, out of the way, and allowing the car, with the impetus thus imparted, to run to the place desired. The engine had been detached, had run ahead, had passed deceased; and he being on the track, or very near it, the car being switched, and following the engine, struck him, and threw him down, so that he was caught by the running gear, and injured so that he died. The evidence was largely devoted to the question whether, when struck, he was on, or just south of, Elm street, and whether, if within the limits of that street, he was walking along the track, or was attempting to cross it diagonally, towards the northwest. Whichever was the fact, he was, when struck, either on the track, or dangerously near to it, with his back to the approaching car.

The fact is indisputable, on the evidence, that, had he looked back before he stepped on or so near the track, he must have seen the approaching car in time to avoid it. One or two of plaintiff's witnesses indicate that there was some fog, and that the engine threw some smoke down upon the track; but even those witnesses testify that they saw, not only the car, but the man, when they must have There is no evidence that he been at a considerable distance. made any effort to learn if there was danger. The only evidence on the point was that he was walking along with his head down, apparently paying no attention to anything. He had lived in the city about five months; was a railroad man; section boss on the Chicago & Northwestern Railroad, the track of which crossed that of the Minneapolis & St. Louis within five or six hundred feet south of Elm street,—the two roads using the same depot at that place; and he must be presumed to have known the situation and danger of the Elm street crossing.

The rule being that one approaching, and about to cross at, a rail-road crossing, must use his senses, his sight and hearing, unless he is in some way, through no fault of his, prevented, to learn if he can make the crossing safely, and that it is negligence per se to place himself upon the track without looking and listening, when he can look or listen, and doing so would inform him of the approaching danger in time to avert it, the deceased was clearly guilty of such contributory negligence as must prevent a recovery. A verdict for the plaintiff could not have been sustained, and defendant was entitled to a direction to return a verdict for him.

Whether the instructions which plaintiff assigns as error were strictly accurate is, in view of the evidence, merely an abstract question. No instructions of the court could change the situation, that defendant was entitled to a verdict, and as the jury rendered the

verdict they were bound, by the evidence, to render, any error in the instructions could have done no harm.

Order affirmed.

VANDERBURGH, J., took no part in the decision.

(Opinion published 55 N. W. Rep. 607.)

FRANK P. O'NEILL vs. Anna R. Johnson.

Argued by appellant, submitted on brief by respondent, May 19, 1898. Decided June 8, 1898.

Complaint Construed.

Complaint held to state a cause of action for malicious prosecution.

Malicious Prosecution of a Civil Action.

An action will lie for malicious prosecution of a civil action.

Damages Remote and Speculative.

The allegations being, in effect, that a garnishment in the action prevented the payment of \$54 to plaintiff's firm; that by reason of its nonpayment they were unable to pay their rent and employes, and because they were so unable their landlord became dissatisfied, and terminated their lease, and their employes became dissatisfied, and refused to work, and in consequence thereof their business was ruined,—held, the injury to the business was not the natural and proximate result of the garnishment, and the damage too remote and speculative.

Appeal by plaintiff, Frank P. O'Neill, from a judgment of the District Court of Hennepin County, William Lochren, J., entered against him May 9, 1892, for \$12.68 costs.

The defendant, Anna R. Johnson, on April 16, 1891, commenced a civil action in a Justice's Court against the plaintiff, Frank P. O'Neill, to recover rent of a dwelling-house leased by her to his father. She claimed that Frank P. agreed to pay the rent. She at the same time made affidavit that she believed that James A. Kellogg was indebted to Frank P. in a sum exceeding ten dollars, and the Justice, on her request, issued a garnishee summons requir-

ing Kellogg to appear before him on April 27, 1891, and answer concerning such indebtedness. The summons was served, and on that day the parties and Kellogg appeared, and the proceedings were dismissed, and the action ended. Kellogg was indebted to Frank P. and his brother jointly, in the sum of \$54, which he refused to pay while the garnishee proceedings were pending.

Afterwards Frank P. O'Neill commenced this action against Mrs. Johnson for maliciously prosecuting that action and garnishing Kellogg, alleging that in defending he was compelled to spend time and labor, worth \$10, and to employ an attorney and pay him \$5, and that his business was broken up by his failure to get the money due him and his brother. He claimed to have thereby sustained \$2,000 damages.

When the issues came to trial April 5, 1892, the court dismissed the action on the ground that the complaint stated no cause of action. Judgment was entered, and plaintiff appeals.

J. M. Burlingame, for appellant.

The court erred in granting the motion of the defendant for judgment on the pleadings. This action will lie for the prosecution of a suit with malice, and without probable cause, if the suit is terminated in favor of the party complaining and he sustained therefrom legal damages. McPherson v. Runyon, 41 Minn. 524; Closson v. Staples, 42 Vt. 209; McCardle v. McGinley, 86 Ind. 540; Cox v. Taylor's Adm'r, 10 B. Mon. 20; Anteliff v. June, 81 Mich. 477; Juchter v. Boehm, 67 Ga. 538; Magmer v. Renk, 65 Wis. 364; Morris v. Scott, 21 Wend. 281; McCracken v. Covington City Nat. Bank, 4 Fed. Rep. 602; Brewer v. Jacobs, 22 Fed. Rep. 217.

Action may be maintained for maliciously suing out process of garnishment, and in such case the main question to be considered is whether the process of garnishment was in fact sued out maliciously and without probable cause. Schumann v. Torbett, 86 Ga. 25. All the loss which the plaintiff sustained in his business as the direct and natural result of the suit, the costs of attorney, as well as all other expenses necessarily incurred in defense, are to be taken into the estimate of damages. Magmer v. Renk, 65 Wis. 364; Tiblier v. Alford. 12 Fed. Rep. 262.

McHale & Abell, for respondent.

Frank P. O'Neill claims damages because the firm of Frank P. O'Neill & Bro. could not collect the sum of \$54, and in consequence thereof that their business was ruined. If the act complained of was the direct cause of the loss to said firm, and if Frank P. O'Neill & Bro. had commenced a suit for damages, they could not have recovered, for the reason that gains and profits in business are uncertain and incapable of proof as a measure of damages. The damages claimed are speculative and too remote and contingent. Simmer v. City of St. Paul, 23 Minn. 408, and cases cited.

Plaintiff could have given a bond, and released the money, and recovered it of Kellogg. Compensation cannot be awarded for the loss of trade, destruction of credit or failure of business prospects. It appears from the answer that Mrs. Johnson had, or at least honestly believed that she had, a just claim against appellant for rent. That she had probable cause, there is no question. The cases cited by appellant are not in point. They are based upon criminal prosecutions, and are cases where the complaints state facts showing actual malice. In every case it appears that the complaining party had sustained actual legal damages, by reason of the facts alleged. Plaintiff has contented himself with alleging that defendant maliciously brought suit against him, without stating any facts showing malice.

GILFILIAN, C. J. The court below, in ordering judgment for defendant on the pleadings, undoubtedly did so because it considered the complaint does not state a cause of action. The statement of damage recoverable in such an action is so obscured by statements in regard to damages not recoverable, because too remote and speculative, that we suspect the court overlooked the former, its attention being wholly directed to the latter.

An action will lie for maliciously and without probable cause prosecuting a civil action, whereby damage is caused to the defendant in such action. *McPherson* v. *Runyon*, 41 Minn. 524, (43 N. W. Rep. 392;) *Burton* v. *St. Paul*, *M. & M. Ry. Co.*, 33 Minn. 189, (22 N. W. Rep. 300;) *Rachelman* v. *Skinner*, 46 Minn. 196, (48 N. W. Rep. 776.)

In an action for malicious prosecution malice is a fact to be pleaded as such, and it would be bad pleading to set forth the evidence to establish it. Want of probable cause, though made up of a question of fact and a question of law, is, like many other composite facts,—such, for instance, as title to property,—a fact for the purpose of pleading, and may be stated directly.

In this complaint it is alleged that the action by defendant against plaintiff was instituted maliciously and without probable cause, and it is further alleged "that this plaintiff was indebted to the defendant in no sum, and liable to her in no manner, whatever, which defendant well knew," from which facts as matter of law there was no probable cause. The termination of that action is alleged, and also that plaintiff necessarily lost time and performed work in and about the defending said action in the sum of \$10, and employed attorneys and was compelled to pay and did pay them \$5 for their services in the defense of the action. These were direct and proximate damages from the malicious bringing of the action, and are recoverable.

The complaint, therefore, states a cause of action.

But the damages predicated on the allegations that by reason of the garnishment in the action the \$54 was not paid to plaintiff's firm, and because it was not paid they were unable to pay their rent and employes in their business, and because they were unable to pay their rent and employes their landlord became dissatisfied, and terminated and canceled their lease, and their employes became dissatisfied, and refused to work for them, and as a consequence their business was ruined, and their prospects blighted, are too remote and speculative. There is too much room for contingencies and intervening causes between the garnishment of the \$54 and the alleged injury to the firm's business and prospects to permit of the latter being considered as the natural and proximate result of the former. Whether it was the result of the former at all must necessarily be arrived at by conjecture and speculation. Cushing v. Seymour, Sabin & Co., 30 Minn. 301, (15 N. W. Rep. 249;) Simmer v. City of St. Paul, 23 Minn. 408; Swinfin v. Lowry, 37 Minn. 345, (34 N. W. Rep. 22;) Carsten v. Northern Pac. R. Co., 44 Minn. 454, (47 N. W. Rep. 49.)

In Goebel v. Hough, 26 Minn. 252, (2 N. W. Rep. 847,) the injury to the business was the direct, immediate result of the wrongful act.

Judgment reversed.

Vanderburgh, J., absent. (Opinion published 55 N. W. Rep. 601.)

SAMUEL FOUNTAIN vs. JOSEPH MENARD et al.

Submitted on briefs May 12, 1898. Decided June 8, 1898.

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Partnership Formed by Parol to Deal in Real Estate.

A partnership may be formed by parol for the purpose of buying, improving, and selling a particular piece of real estate.

Findings Sustained by the Evidence.

Evidence held to justify findings of fact.

Appeal by defendants, Joseph Menard and Arthur L. Menard, from an order of the District Court of Hennepin County, Frederick Hooker, J., made October 17, 1892, denying their motion for a new trial.

In April, 1890, the plaintiff, Samuel Fountain, and the defendants made an oral agreement to become partners in the purchase and improvement of lots ten (10) and twelve (12) in block four (4) in Morrison's Addition to Minneapolis. Arthur L. Menard was the son of Joseph Menard. The son was to have a half interest, and the father and plaintiff each a fourth interest, in the partnership. The father was to receive and hold the title, and mortgage the property for \$10,000. This money was to be used in the enterprise, and he was to advance to the partnership enough more to pay for the lots and complete the buildings. The lots were bought, the mortgage made, and a block of six retail stores erected. The total cost was \$18,795.26.

The defendants denied that plaintiff was a partner or interested with them in the property. This action was commenced January 29, 1891, for a dissolution, and an accounting, and pending the action, for a receiver of the rents and profits. The issues were by consent referred for trial to Robert L. Penney, Esq. He heard the evidence, and on June 4, 1892, reported that an oral agreement of partnership was made, as claimed by plaintiff, and that it should be dissolved. He directed the property sold, subject to the mortgage, and Joseph Menard repaid his advances to the firm. He awarded to plaintiff one-fourth of the residue. Taxes and interest paid, and rents received, to be adjusted on this basis.

Defendants moved the court to set aside the report and grant a new trial. Being denied, they appeal.

O. Tessier and Benjamin Davenport, for appellants.

The agreement alleged is within the statute of frauds, and no trust was created. A partnership cannot be created orally for the purposes alleged in the complaint. The mere fact that the plaintiff was to have a portion of the rents and income, and own a portion of the property, did not constitute a partnership. This property was not bought with partnership funds, or to aid in any partnership purpose. But if plaintiff had any interest, it was that of a joint owner. Wells v. Babcock, 56 Mich. 276; Farrand v. Gleason, 56 Vt. 633; Munson v. Sears, 12 Iowa, 172; 23 Iowa, 380; Williams v. Gillies, 75 N. Y. 197.

Day & Enches, for respondent.

A partnership may be formed by parol to buy and sell real estate. Hodge v. Twitchell, 33 Minn. 389; Newell v. Cochran, 41 Minn. 374; Stern v. Harris, 40 Minn. 209; Dale v. Hamilton, 5 Hare, 369; Chester v. Dickerson, 54 N. Y. 1; Bunnel v. Taintor, 4 Conn. 568; Holmes v. McCray, 51 Ind. 358; Richards v. Grinnell, 63 Iowa, 44.

In such cases, neither party conveys or assigns any lands to the other, and hence there is no conflict with the statute of frauds, and the partnership real estate will be treated as personal property as between the partners. *McElroy* v. *Swope*, 47 Fed. Rep. 380; *Pennybacker* v. *Leary*, 65 Iowa, 220; *Allison* v. *Perry*, 130 Ill. 9; *Wallace* v. *Carpenter*, 85 Ill. 590; *York* v. *Clemens*, 41 Iowa, 95.

GILFILLAN, C. J. The complaint in this action was so drawn as to suggest the question whether the plaintiff was proceeding on

the theory of a partnership between the parties to deal in the real estate or of an attempt merely to create a trust in it. It does allege a partnership formed for the purpose; and, without an application to require the plaintiff to make the complaint more definite and certain, or to elect on which theory he would proceed, he had a right to prove any cause of action within the allegations of the complaint, and, as there were enough of them to show a case of partnership, the defendants' motion for judgment on the pleadings was properly denied. From the evidence, though it also pointed to the two theories suggested by the complaint, the referee might fairly find that a partnership to buy, improve, and dispose of the real estate was formed. The right to share in the profits or losses, if any, though nothing was expressly agreed on with respect to them, would, of course, follow.

There is no question that a partnership may be formed by parol to deal in real estate, *Hodge v. Twitchell*, 33 Minn. 391, (23 N. W. Rep. 547;) Newell v. Cochran, 41 Minn. 378, (43 N. W. Rep. 84,) and we see no reason to doubt that one may be formed to buy, improve, and sell, for joint profit, a particular piece of real estate.

Where real estate is acquired in a partnership business and for its purposes it is partnership assets, though the legal title be taken in the name of one of the partners; and in closing the affairs of the concern the court may convert it into personal property for distribution, the same as other assets.

There was no prejudicial error in admitting evidence. That in relation to the value of the property and of alleged extra work of plaintiff was immaterial, but no finding of fact is based upon it, and manifestly it could have had no influence upon the findings as made.

Order affirmed.

VANDERBURGH, J., took no part in the decision. (Opinion published 55 N. W. Rep. 601.)

RUFUS C. JEFFERSON et al. vs. CARL ASCH et al.

Argued May 10, 1893. Decided June 8, 1893.

Action by a Third Person, to Enforce a Contract between Others, but Beneficial to Him.

A stranger to a contract between others, in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, cannot recover upon it.

Appeal by plaintiffs, Rufus C. Jefferson and James Kasson, from an order of the District Court of Ramsey County, William Louis Kelly, J., made November 19, 1892, sustaining a demurrer to their complaint.

On March 29, 1889, the Boston Northwest Real-Estate Company, a corporation, owned the lot and buildings on Sixth Street, St. Paul, known as "The Bodega," and on that day leased the property to George Benz for five years next after May 1, 1889. Benz sublet the premises March 1, 1892, to Sarah J. Smith and Bridget Poupeney, from that date to May 1, 1894.

They employed defendant Matthew J. Leithauser on March 14, 1892, to make alterations and repairs in the buildings. He, as principal, with Carl Asch and John Boldthen, as sureties, gave a bond to "George Benz for the use of the Boston Northwest Real-Estate Co. and all persons who may do work or furnish materials," in the penal sum of \$2,000, conditioned to be void if Leithauser should pay all just claims for work done, and materials furnished, in the prosecution of the work, and indemnify Benz and the corporation from mechanics' liens. The plaintiffs furnished Leithauser with lumber to do the work, and brought this action on the bond to recover of him and his sureties \$248.58, its value. See Union Ry. S. Co. v. McDermott, ante, p. 407. The sureties, Asch and Boldthen, demurred, on the ground that the complaint did not state facts constituting a cause of action against them, and the trial court sustained the demurrer, saying:

"The Boston Northwest Real-Estate Company had no interest to protect. No lien could attach to its interest in the land by reason of repairs made by the tenants. George Benz likewise had nothing to protect; though in form he sublet to S. J. Smith & Co., he, in

law, assigned his entire interest under the lease. Craig v. Summers, 47 Minn. 189.

"Under the principle settled in *Brown* v. Stillman, 43 Minn. 126, there must be some privity of contract between Benz, the obligee in the bond, and these plaintiffs, or he must have had some interest in the land to be protected, to warrant the inference that the contract was made for plaintiff's benefit. Benz being a stranger to the building contract, and having no interest in the land, the promise to him did not inure to plaintiff's benefit."

Owen Morris, for appellants.

The point on which the demurrer turned was raised by the Judge of the District Court. It was not mentioned at the time of argument; hence no authorities thereon were cited.

Plaintiffs do not base their claim upon any harm to George Benz, or any clouding of his property. The clause in the bond to pay all just claims for materials furnished in the execution of the work, is a sufficient warranty for this action. Follansbes v. Johnson, 28 Minn. 311; Bennett v. McGrade, 15 Minn. 132, (Gil. 99;) Slosson v. Ferguson, 31 Minn. 448; Steffes v. Lenke, 40 Minn. 27; Thomas v. White, 12 Mass. 366; Sweetser v. Hay, 2 Gray, 49.

The party for whose sole benefit a contract is evidently made, may sue thereon in his own name, although the engagement be not directly to, or with him. Allen v. Thomas, 3 Met. (Ky.) 198; Brewer v. Dyer, 7 Cush. 337; McDowell v. Laev, 35 Wis. 171.

F. W. Zollman, for respondent.

It is necessary that the obligee in a bond, in terms for the benefit of others, should either have an interest in the subject-matter, or be in privity of contract, or at least owe some duty or obligation, to such third persons, in order that the contract may inure to their benefit. It does not appear that the obligee, or plaintiffs, had any interest in the subject-matter, or that there was any privity of contract between them; on the contrary, absence of interest and want of privity of contract, appear affirmatively upon the face of the complaint. The common-law rule is, that only parties in privity of contract, and parties to the consideration, can sue; and this rule still prevails in most of the States. Exchange Bank v. Rice, 107 Mass.

37; Ellis v. Clark, 110 Mass. 389; Neubrecht v. Santmeyer, 50 Ill. 74; Moore v. House, 64 Ill. 162; Garnsey v. Rogers, 47 N. Y. 233; Simson v. Brown, 68 N. Y. 355; King v. Whitely, 10 Paige, 465; Vrooman v. Turner, 69 N. Y. 280; Litchfield v. Flint, 104 N. Y. 543; Wilbur v. Warren, 104 N. Y. 193; Lorillard v. Clyde, 122 N. Y. 498; Comley v. Dazian, 114 N. Y. 161.

GILFILLAN, C. J. The Boston Northwest Real-Estate Company owned a lot on Sixth street, St. Paul, with two buildings standing on it, and let it to George Benz for the term of five years from May 1, 1889, and about three years thereafter he sublet it for the remainder of his term to Smith & Co. Afterwards Smith & Co. entered into a contract with the defendant Leithauser to make certain alterations and repairs and the defendants Leithauser as principal, and Asch and Boldthen as sureties, executed a bond, in which they acknowledged themselves to be indebted to George Benz, "for the use of the Boston Northwest Real-Estate Company," "and all persons who may do work or furnish material" pursuant to said contract, "to be paid to the said George Benz, his executors, administrators, or assigns, for the said use," and which was conditioned to be void if Leithauser should pay "all just claims for all work done and to be done and all materials furnished and to be furnished pursuant to said contract and in the execution of the work therein provided for, as they shall become due, and shall indemnify and save harmless said George Benz and said Boston Northwest Real-Estate Company from all mechanics' liens," etc., and "indemnify and save harmless the said George Benz from all claims of whatever description which may arise from, in, or about said work, alterations, and repairs."

The plaintiffs, having furnished materials to the contractor for the purposes of the contract, bring this action on the bond to recover the price thereof.

The court below sustained a demurrer to the complaint.

From the seals to this bond there arises the presumption of a sufficient consideration to sustain it between the parties to it.

The cases in which one not a party to a contract may sue upon a promise in it for his benefit were at one time limited to contracts not under seal, and this court, in stating the law on the subject, in Follansbee v. Johnson, 28 Minn. 311, (9 N. W. Rep. 882,) expressed

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that limitation; but the distinction in this respect between contracts by specialty and simple contracts has not in the later authorities been adhered to, and may now be regarded as abandoned. If there ever was any reason for the distinction, it could only have been a technical one, which no longer has any merit to commend it, and we do not think we ought to recognize it.

Though this seems intended as a mere bond to indemnify and save the obligee named harmless, that, and not any incidental benefit that might accrue to others not parties to it, being the primary purpose of its stipulations and promises, we will treat it, because on both sides it is so presented here, as though such primary purpose were to secure payment to the persons doing work or furnishing material under the contract mentioned in it. In considering the question presented we must lay aside, as having no bearing upon it, the cases of official or statutory bonds required or authorized for the benefit or security of persons not named as obligee, a nominal obligee being named, and where the statute expressly or by implication authorizes such persons to sue upon them. Instances of such are sheriffs' bonds, probate bonds, bonds authorized by the mechanic's lien law in 1878 G. S. ch. 90, and such as were considered in City of St. Paul v. Butler, 30 Minn. 459, (16 N. W. Rep. 362,) and Morton v. Power, 33 Minn. 521, (24 N. W. Rep. 194.)

As, so far as appears by the complaint, Benz could not be liable to pay for the work done and materials furnished in fulfilling the contract to repair, and as, under the law then in force, his interest in the property could not be subject to a lien therefor, it was legally a matter of indifference to him whether the work and materials were paid for or not. He had no duty in respect to it. And the question comes to this: Where, in a contract between two persons one promises the other to do something for the benefit of a stranger to the contract, and the promisee has no relation to the thing to be done nor to the stranger to be benefited, can such stranger bring an action to enforce the promise?

In some of the text-books and decisions it is stated generally "that, where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." But we do not think there is a case to be found in which such an action was sustained upon a bare promise, with no other circumstances to v.53m.—29

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justify an exception to the general rule that an action upon contract can be maintained only where there is privity of contract between the parties. In Lawrence v. Fox, 20 N. Y. 268,—the most conspicuous and most thoroughly reasoned case in New York, sustaining an action by a stranger to a contract,—the promisee owed the debt which the promisor agreed to pay, and loaned him the money, which he agreed to pay to the promisee's creditor.

Thorp v. Keokuk Coal Co., 48 N. Y. 253, was a case where the grantee in a conveyance of real estate assumed to pay a mortgage resting on it to secure a debt of the grantor. In the syllabus to the case it is stated that it overrules King v. Whitely, 10 Paige, 465, but, as we read the opinion, it goes no further than to question the reason given by the chancellor in the latter case for sustaining an action in such a case when it can be sustained. The case in 10 Paige was one where the grantee in a conveyance assumed to pay a mortgage on real estate for which the grantor was not personally liable. It was held that the creditor could not recover of the grantee. chancellor stated as the principle upon which a creditor can recover from a grantee so assuming to pay a debt of the grantor that a creditor is entitled to be subrogated to securities for the debts held by a surety, and that between the grantor and the grantee in such case the latter becomes the principal debtor and the former surety. Another and simpler reason might have been given, to wit, that where one delivers to or leaves in the hands of another a fund with which to satisfy an obligation of the former, a duty in the nature of a trust is thereby created. The decision in 10 Paige was followed in Trotter v. Hughes, 12 N. Y. 74, and approved in Garnsey v. Rogers. 47 N. Y. 233.

In Vrooman v. Turner, 69 N. Y. 280, similar in its facts to the case in 10 Paige, the court go over the whole ground, recognize the decision in Lawrence v. Fox, supra, and hold the two decisions consistent, and follow that in 10 Paige. It lays down this rule: "To give a third party, who may derive a benefit from the performance of the promise an action, there must be—First, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two,—the promisee and the party to be benefited,—and some obligation or duty from the former to the latter which would give him a legal or equitable claim to the benefit of the

promise, or an equivalent from him personally." "There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement;" and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." cases, near relationship, as of father and daughter, or uncle and nephew has been held to supply the place of a strictly legal right in the third party. Dutton v. Pool, 1 Vent. 318; Felton v. Dickinson, 10 Mass. 287,—are instances of such. To enforce such a promise in favor of a third party, where there is no obligation to benefit him on the part of the promisor or promisee, nor anything such as near relationship, nor any consideration from the third party, would be much like enforcing an intended gift or gratuity. Vrooman v. Turner settled the law in New York, as the decision, though subsequently referred to with approval,—see Wilbur v. Warren, 104 N. Y. 193, (10 N. E. Rep. 263;) Litchfield v. Flint, 104 N. Y. 543, (11 N. E. Rep. 58;) Comley v. Dazian, 114 N. Y. 161, (21 N. E. Rep. 135;) Lorillard v. Clyde, 122 N. Y. 498, (25 N. E. Rep. 917;) Durnherr v. Rau, 135 N. Y. 219, (32 N. E. Rep. 49,)—has never since been questioned.

The question was considered and the cases in Massachusetts summed up in an able and exhaustive opinion by Metcalf, J., in Mellen v. Whipple, 1 Gray, 317. That was the case of an agreement by a grantee of real estate to pay a mortgage for which the grantor It was held the creditor could not rewas not personally liable. cover from the grantee. The court attempts to classify the cases in that state in which one not a party to the promise has been permit-The classification may be briefly stated asted to sue upon it. First, cases where the defendant has in his hands money which in equity and good conscience belongs to the plaintiff,—as, if A. put money or property in the hands of B. as a fund from which A.'s creditors are to be paid, and B. has promised expressly or impliedly to pay such creditors; second, cases where a near relationship, as father and child, or uncle and nephew, exists between the promisee and the person to be benefited; third, the cases of which Brewer v. Dyer, 7 Cush. 337, is an instance, in which the defendant agreed with a lessee of premises to take the lease and pay the rent to the lessor, and entered with the knowledge of the lessor, paid him the rent for a year, and then left before the term expired.

We have referred so fully to the decisions in New York and Massachusetts because in those states the question has more frequently arisen, and been more ably and thoroughly discussed, than elsewhere in this country.

There has been no decision of this court at variance with the rule as held in those two states. In every case but one the promise was to pay a debt of the promisee, and a fund was either left or put in the hands of the promisor for the purpose. That one case was decided in a line with the rule held in the *Vrooman* and *Mellen* Cases. A grantee of real estate had assumed a mortgage debt for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. *Brown* v. *Stillman*, 43 Minn. 126, (45 N. W. Rep. 2.)

Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are prepared to say that, where there is nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it.

Such is this case.

Order affirmed.

Vanderburgh, J., took no part in the decision.

(Opinion published 55 N. W. Rep. 604.)

BENJAMIN F. KING vs. NICHOLS & SHEPARD Co.

Submitted on briefs May 25, 1893. Affirmed June 8, 1893.

Practice if Complaint is Indefinite or Uncertain.

In an action on a contract to put a machine in good condition, the objection that the complaint does not state specifically the particulars in which it was defective ought to be made by motion to require the complaint to be made more definite and certain.

Verdict Sustained by the Evidence.

Evidence held sufficient to sustain the verdict.

When Objection to Evidence should be Specific.

Rule that, when an objection to evidence offered is of such a character that other evidence may remove it the objection must be specifically stated when the evidence is offered, applied.

Damages Sufficiently Stated.

In such an action as above, an allegation that plaintiff will be obliged to expend a specified sum to put the machine in good condition is equivalent to an allegation that the reasonably necessary cost will be such sum.

Appeal by defendant, Nichols & Shepard Co., a corporation, from an order of the District Court of Mower County, John Q. Farmer, J., made July 18, 1892, denying its motion for a new trial.

On September 20, 1890, at Dexter, Minnesota, the defendant sold to the plaintiff, Benjamin F. King, a second-hand portable steam engine and separator for threshing and cleaning grain for \$1,212, and warranted them to be well made and in good repair and condition. Plaintiff had not seen the engine or separator when he bought them. They were afterwards shipped to him, but were found to be out of repair and defective in several particulars, and plaintiff refused to accept or pay for the property. To induce him to do so, defendant, by its agents, then agreed with plaintiff to put the machinery in good repair and condition. It failed to do this, and plaintiff brought this action to recover damages for breach of this agreement. He alleged that he would be obliged to expend \$500 to put the same in repair and good condition, and that he had been damaged that amount by defendant's failure to perform this agreement, and prayed judgment for that sum. The issues were tried

March 28, 1892, and plaintiff had a verdict for \$250. Defendant moved for a new trial; and being denied, it appeals.

George W. Somerville, for appellant.

There is no breach of warranty involved. The complaint alleges that plaintiff refused to receive the machine for the reason that it did not comply with the warranty. That, of course, was the end of that contract. A new contract was then entered into by which defendant agreed to place the machine in good repair and condition. The value of such repairs constitutes plaintiff's cause of action. But the complaint nowhere alleges the market value of such repairs, and in this we think it defective. It is true that the complaint alleges that the machine is worth \$500 less by reason of its being out of repair than it would be if in good repair and condition. This allegation of the difference in value of the machine cannot take the place of an allegation as to the fair market value of the repairs. Harvesting Mach. Co. v. Frolkey, 34 Neb. 110; D. M. Osborne & Co. v. Huntington, 37 Minn. 275.

The complaint is insufficient for the reason that it does not show wherein said machine was defective and out of repair, nor wherein defendant failed to perform its part of said agreement. Aultman, Miller & Co. v. Seichting, 126 Ind. 137.

It may be admitted that an agent who has power to sell, has power to warrant, but it does not follow that he has power to make the contract in question. This rule applies, as we understand it, only to the sale of such articles as are usually sold with warranties, and therefore would not apply to a second-hand machine. McCormick v. Kelly, 28 Minn. 135.

French & Wright, for respondent.

A witness stated that the machine, in its then condition, was worth \$500 less than it would have been if in the condition the defendant agreed to place it. This is equivalent to showing what would be the cost of repairs.

If the complaint was not sufficiently certain and definite, the defendant's remedy was a motion to have it made more certain and definite, and not by objection at the trial. Rathburn v. Burlington

& M. R. Co., 16 Neb. 441; Redmon v. Phænix Fire Ins. Co., 51 Wis. 292.

The agent should be deemed to have been empowered to make the contract. Boynton Furnace Co. v. Clark, 42 Minn. 335; Deering v. Thom, 29 Minn. 120; Oster v. Mickley, 35 Minn. 245.

GILFILIAN, C. J. The complaint is good. It alleges a contract to put the machine in good repair and condition; a failure to do so; that it was broken in several parts, defective, and out of repair; and what it would cost to put it in the repair and condition which defendant had agreed to put it in. If the defects in the condition of it were not alleged specifically enough to enable defendant to prepare to try the issue, its proper course was by motion to require the complaint to be made more definite and certain in those particulars. The assignments of error and the objections to evidence, based on the assumed insufficiency of the complaint, have, therefore, no foundation.

The evidence was sufficient to justify the jury in finding that the agent who sold the machine had authority to make the contract sued on; that the machine was out of repair; and from the evidence they might have found that it would have cost \$406 to put it in good repair and condition. Their verdict was for \$250.

The objection now made to some of the evidence as to the condition of the machine, that the times referred to by the witnesses were too remote from the time of the contract, was not specifically taken at the trial. The rule which this court has always followed,—certainly since Gilbert v. Thompson, 14 Minn. 544, (Gil. 414,)—is that, where the real objection to evidence is of such a character that, if specifically pointed out when the evidence is offered, the party offering it may remove the objection by further evidence, the general objection that the evidence is incompetent, immaterial, or irrelevant will not cover it, but it must be specifically stated. Had it been so made in this case, it might have been removed by proof that, when seen by the witnesses, the machine was in the same condition as when delivered to plaintiff

Upon such a contract as this, to wit, to put the machine in good repair and condition, it was not necessary that, in order to recover, plaintiff should himself put it in that condition. As soon as defend-

ant failed to do what it agreed to do plaintiff might recover the reasonably necessary cost of doing it; and the allegation in the complaint that plaintiff will be obliged to pay out and expend a specified sum to put the machine in the condition that defendant agreed to put it in is equivalent to an allegation that the reasonably necessary cost of putting it in such condition was that sum.

We see nothing in any assignment of error not above referred to that requires special mention. Order affirmed.

VANDERBURGH, J., took no part in this decision. (Opinion published 55 N. W. Rep. 604.)



GEORGE W. NORTON et al. vs. J. M. BECKMAN.

Argued May 24, 1893. Affirmed June 8, 1893.

Judgment in Form Sufficient.

An entry of judgment held sufficient.

Judgment on the Pleadings.

In proceedings by a landlord against his tenant under 1878 G. S. ch. 84, judgment on the pleadings may be ordered as in other cases.

Equitable Defense in Proceedings for Unlawful Detainer.

Petsch v. Biggs, 81 Minn. 392, followed, to the effect that, in proceedings under that chapter, equitable matter, which requires affirmative relief to make it a defense per se, cannot properly be interposed in the answer, and that if interposed the case cannot for that reason be certified to the district court.

Appeal by defendant, J. M. Beckman, from a judgment of the Municipal Court of the City of Duluth, Roger S. Powell, J., entered September 27, 1892.

On September 1, 1889, the plaintiffs, George W. Norton and Martha R. Norton, leased to defendant lot 86, block 2, in Duluth Proper, Third Division, for the term of three years next thereafter. The tenant agreed to pay \$150 per month rent, and at the expiration of the term to quietly yield and surrender the premises to the lessors. On September 20, 1892, plaintiffs made complaint under 1878

G. S. ch. 84, § 11, stating these facts and that the term had expired and that defendant wrongfully withheld the premises, and prayed restitution. Defendant answered that he had paid all rent; that in the lease plaintiffs covenanted with him that he should have the right and option, at any time prior to the expiration of the lease, to take a new lease for a period of not less than twenty years at an annual rental, not exceeding six per cent. of the value of the lot, exclusive of buildings; that he elected to take such new lease, and notified plaintiffs, and demanded such new lease. That they refused. That relying on this right of renewal, he had made permanent improvements on the lot exceeding \$2,000 in value. He asked judgment that plaintiffs take nothing by their complaint, and that they make and deliver to him such new lease.

The action came to trial September 26, 1892, and the court ordered judgment for plaintiffs upon the pleadings. Defendants excepted, and judgment was entered as follows:

"Sept. 27, 1892. Order for judgment as prayed for in complaint filed, whereupon judgment is hereby entered in favor of the plaintiffs and against the defendant for the restitution of the premises described in the complaint, and for costs and disbursements taxed at \$7.25." On October 21, defendant moved the Municipal Court to vacate the judgment, and certify the action to the District Court. This was refused.

N. A. & H. G. Gearhart and Lord & Norton, for appellant.

The plaintiffs moved for judgment on the pleadings, on the ground that the answer did not state facts sufficient to constitute a defense, which motion was resisted by the defendant. Without swearing a witness or introducing any evidence, and in violation of the charter, which requires the court to cease all proceedings and certify the cause to the District Court when equitable relief is demanded, the court ordered and entered judgment on the pleadings. On October 21, 1892, defendant moved the court to vacate and set aside the judgment and to certify the cause to the District Court.

Sp. Laws 1891, ch. 53, § 2, subd. 2, p. 596, provides that the jurisdiction of the Municipal Court shall not extend to an action wherein the relief demanded in the complaint is equitable in its nature. It

says nothing in this section about equitable relief being demanded in the answer. But by analogy, if for no other reason, the same rule should be applied to the answer. In the case at bar, the answer demanded equitable relief. This Act, § 20, provides that where any equitable defense or ground for equitable relief is interposed, the court shall cause an entry of the fact to be made of record, and certify and return to the District Court a transcript of all entries made in the record, together with all process and other papers relating to the suit. Thereupon the District Court proceeds to final judgment and execution according to law.

The defendant claims there was no trial in the Municipal Court. Hence Sp. Laws 1891, ch. 53, § 26, is not applicable to this case.

It is error to enter judgment on the pleadings in cases under 1878 G. S. ch. 84. In unlawful detainer proceedings, judgment can only be entered on proofs and a hearing. The statute so provides. *Hennessey* v. *Pederson*, 28 Minn. 461.

The Municipal Court of Duluth is a court of record, with a seal and a clerk, and its judgments should be entered with the same regularity and solemnity as in any other court of record.

Carey, Agatin & Carey, for respondents.

The particular agreement for a new lease relied upon as a defense is void on its face for vagueness and uncertainty. It is not what is called a renewal clause, but an attempted agreement for a new lease. But there is nothing agreed upon in it. Every essential to such an agreement is left for subsequent negotiation between the parties. It is void for uncertainty. Reed v. Campbell, 43 N. J. Eq. 406; Frost v. Moulton, 21 Beav. 596; Wood v. Midgley, 5 De G., M. & G. 41; Stratford v. Bosworth. 2 V. & B. 341; Graham v. Call, 5 Munf. 396; Abeel v. Radcliff, 18 Johns. 297; Clinan v. Cooke, 1 Sch. & Lef. 22.

Sp. Laws 1891, ch. 53, § 19, subd. 4, provides that the practice and proceedings in actions under 1878 G. S. ch. 84, shall be the same as in Justice Court; § 18 of this chapter provides that all matters in excuse, justification and avoidance of the allegations in the complaint shall be set up in the answer. This must be understood to refer to matters which per se constitute an excuse, justification or

avoidance, which of themselves, and without affirmative aid from a court, entitle the defendant to retain the present possession, and does not include those matters upon which a proper court might afford the defendant affirmative relief, and which go to his right to possession, only after such relief has been granted. Petsch v. Biggs, 31 Minn. 892.

The court could not certify the case to the District Court because the allegations of the answer did not constitute a proper defense to this action. If defendant had any right to a new lease, he should have taken steps to enforce it in a proper tribunal, or to enjoin the proceedings in the Municipal Court, pending the adjustment of his alleged equitable rights. As the case stood, the lower court had no power to certify the case to the District Court, nor to pass upon the validity of his defense.

GILFILLAN, C. J. The judgment in this case was perhaps in some respects informal but it was sufficient in substance, for it expressed the decision of the court on the matter involved, and the relief granted. It would have been good as a judgment either in the District or in a Justice's Court.

In proceedings under 1878 G. S. ch. 84, the pleadings are to be construed, and are to have the same effect, as in a "civil action." When the answer expressly, or by failing to deny, admits the allegations in the complaint, the admission is equivalent to proof. Hennessey v. Pederson, 28 Minn. 461, (11 N. W. Rep. 63,) did not decide otherwise, but that, under that chapter, judgment cannot be taken by default without proof of the allegations in the complaint, as is the case in certain civil actions. It follows that if the answer admits the material allegations in the complaint, and alleges no defense, the court may render judgment on the pleadings, as in other cases. There is in such case nothing to try, except by the allegations and admissions in the pleadings.

The only other points in the case deserving mention, to wit, that an equitable defense was alleged, and that, because the municipal court could not try such defense, it ought to have certified the cause to the district court, are fully disposed of by Petsch v. Biggs, 31 Minn. 392, (18 N. W. Rep. 101,) in which it was held that equitable matter, which requires affirmative relief to be a defense per se, can-

not be interposed in proceedings under chapter 84, but that the defendant must first obtain that equitable relief in a court competent to give it, and also that the case cannot be certified to the district court because of such equitable matter being interposed. That case came up from the municipal court of St. Paul, but in this respect there is no difference between the provisions of the act establishing that court, and those of the act establishing the municipal court of Duluth.

Order and judgment affirmed.

VANDERBURGH, J., took no part in the decision. (Opinion published 55 N. W. Rep. 603.)

MICHAEL DONAHUE vs. PETER DONAHUE et al.

Submitted on briefs May 16, 1893. Affirmed June 8, 1893.

Evidence of Contract by a Father with His Son to Pay Him for His Services.

The presumption that a son who, after arriving at his majority, continues a member of his father's family, working for him apparently as before, is working for his support, as in his minority, may be overcome, and an agreement by the father to pay for the son's work after majority proved by evidence, indirect, or circumstantial, by the conduct or conversations of the parties, or the admissions of the father.

Such Evidence is not Required to be Clear, Direct and Certain.

In an action to recover for such work, a request by defendant to charge that "the evidence must be clear, direct, and certain" is objectionable, as it may mislead the jury.

Appeal by defendants, Peter Donahue et al., Executors, from an order of the District Court of Freeborn County, Thomas S. Buckham, J., made August 9, 1892, denying their motion for a new trial.

The plaintiff, Michael Donahue, for nearly three years after he became of age, remained at home living with, and working for, his father on his father's farm in the town of Nunda. His father

died testate December 26, 1890; the will was proved, the defendants received letters testamentary, and accepted the trust. The son presented his claim for services. It was rejected in the Probate Court, and he appealed. In the District Court pleadings were framed under Laws 1889, ch. 46, § 260, and on the trial, plaintiff had a verdict for \$325. The Executors moved for a new trial but were refused and they appeal to this court.

Lovely & Morgan, for appellants.

W. E. Todd, for respondent.

GILFILIAN, C. J. The evidence was abundant to sustain a finding that, while the plaintiff continued to work for his father after he became of age, there was an agreement between them that the father should pay him for his work. Of course, from the fact alone that the son continued after he became of age, a member of the father's family, working for him apparently as before he became of age, no agreement to pay him for his work would be implied, but the presumption would be that he worked for his support, as while a minor. But the evidence was sufficient to overcome that presumption, and justify a finding that there was an agreement to pay. All that could be required was that it was such as to reasonably satisfy the jury of the fact. It might be indirect or circumstantial; shown by the conduct or conversations of the parties, or admissions by the father.

The statement in the appellant's second request to charge, that "the evidence must be clear, direct, and certain," might have misled the jury to suppose that, to justify a finding that there was such an agreement, it must have been directly testified to by some witness who heard it made, and that part of the charge was objectionable. All there was unobjectionable in the request was in the court's general charge, given clearly, explicitly, in much better terms than are contained in the request.

Order affirmed.

Vanderburgh, J., took no part in the decision. (Opinion published 55 N. W. Rep. 602.)



C. GOTZIAN & CO. vs. JOSEPH STEINKAMP.

Argued May 26, 1893. Affirmed June 8, 1893.

Consideration for Promissory Notes.

S. executed notes payable to G., and delivered them to K., upon the understanding between them that K. should deliver them to G., and get from G., for his own benefit, money, or the equivalent of money. K., who had collected from S. money due to G., and had failed to pay it over to G., turned the notes over to G. in lieu of that much money so collected by him, and they were received by G. as the equivalent for that amount of such money. *Held*, from the time they were so turned over there was a full consideration for them, and G. can recover on them.

Appeal by defendant, Joseph Steinkamp, from a judgment of the District Court of Ramsey County, *Chas. D. Kerr*, J., entered August 22, 1892, against him for \$665.83.

The plaintiff, C. Gotzian & Co., is a corporation engaged in selling goods. On June 20, 1889, Henry Kopp was its traveling salesman, and authorized to collect money due it for goods. The defendant was a customer, bought goods and paid its agent Kopp for them, but Kopp failed to pay over the money to plaintiff. Steinkamp supposed it was paid over, and plaintiff supposed it had not been paid. On the last-named day, at Kopp's request, and for his accommodation, defendant made his two promissory notes, one for \$300, due in sixty days, and the other for \$218.30, due in ninety days, both payable to the order of C. Gotzian & Co., and delivered them to Kopp, with the intention and understanding that Kopp should borrow money on them of plaintiff to be used by Kopp for his benefit.

Kopp delivered the notes to plaintiff in lieu of that amount of money. Its officers took them supposing that defendant had not paid his bill, but had given the notes instead of money. When the notes fell due, they were not paid, and the corporation brought this action to recover their contents. The defendant answered that the notes were made without consideration, and denied that they were ever lawfully delivered.

The action was tried and findings filed May 23, 1892, directing

judgment for the plaintiff. On motion of defendant, additional findings of fact were made July 23, 1892.

F. Barta and Munn, Boyesen & Thygeson, for appellant.

Morphy, Gilbert & Morphy and John D. O'Brien, for respondent.

GILFILIAN, C. J. Plaintiff, through its agent, one Kopp, sold goods to defendant, for which defendant paid Kopp, who had authority from plaintiff to receive payment. Kopp did not pay over to his principal the amount collected, he being short in such payment more than the amount of the notes in suit, the principal not knowing that he had received from defendant the amount for which he was short. On application of Kopp, defendant executed the notes, (payable to plaintiff,) and delivered them to him, "with the intention and understanding on the part of defendant and Kopp that Kopp should deliver said notes to plaintiff, the payee, and get for his (Kopp's) benefit money, or the equivalent of money, from the plaintiff for the same;" and Kopp turned the notes in to plaintiff in lieu of that much money which he had collected, and the same was received by plaintiff as the equivalent for that much of such money.

As between Kopp and plaintiff the transaction was the same, in effect, as if he had received from plaintiff the money on the notes, and immediately paid it to plaintiff on his account. After it, plaintiff's claim against him was diminished by the amount which the notes called for. It does not affect their validity that the consideration did not actually come into the hands of the defendant. He authorized Kopp to receive, and Kopp did receive, it; and from the time of his receiving it there was a consideration to support the notes, as fully as if the money or thing which constituted it had gone directly to defendant, or to any one else designated by him to receive it.

Judgment affirmed.

VANDERBURGH, J., took no part in the decision.

(Opinion published 55 N. W. Rep. 602.)

INGRI LILLSTROM vs. NORTHERN PACIFIC RAILROAD Co.

53 464 176 509

Argued April 28, 1893. Affirmed June 12, 1893.

Railroad Company must Keep in Repair Crossings that it Allows the Public to Use as a Highway.

The rule laid down in *Kelly v. Southern Minn. Ry. Co.*, 28 Minn. 98, that where a road is openly and notoriously used as a highway by the public, and is recognized by a railway company as such, by permitting the public to cross the track, and by assuming to maintain a crossing at that point, it is immaterial that the road has not been legally laid out or established, followed and applied to the facts in this case.

A Reasonable Probability Arising from the Facts Proved will Support a Verdict.

In civil actions it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth.

Appeal by defendant, Northern Pacific Railroad Company, from an order of the District Court of Clay County, *Ira B. Mills*, J., made July 25, 1892, denying its motion for a new trial.

Peder Lillstrom died February 20, 1890. He was injured in the manner stated in the opinion. Plaintiff, Ingri Lillstrom, his widow, was appointed administratrix of his estate, and brought this action under 1878 G. S. ch. 77, § 2, as amended by Laws 1889, ch. 109, to recover \$10,000 damages for the exclusive benefit of herself and his next of kin.

At the close of all the testimony, the defendant moved the court to direct the jury to return a verdict in favor of the defendant, for the reason that it appears conclusively by the undisputed evidence that the crossing in question was put in by private individuals, at their own instance, and for their own use, and not on any line of any public highway, and that assent to the use thereof by the public had never been given by the defendant. That the injury complained of was not a natural or probable result of taking up the crossing plank, and was not a result to be anticipated to follow from such act. The taking up of the plank was not the proximate cause of the injury. The testimony does not show a cause of action

against the defendant in favor of the plaintiff. The motion was denied, and defendant excepted. The court, among other things, instructed the jury as follows: "From the testimony in this case, it appears that this was not a public highway; there is no evidence that this was a public laid out highway, the testimony is to the contrary. So the defendant had the right as against the public to take up the crossing; there was no duty on it to maintain this crossing. But if you find that the road was frequently traveled and used by the public, and defendant took the crossing up without putting up any barriers or notice, and the deceased had no notice of it, then, if the road was left in a dangerous condition, it would be negligence on its part. If defendant had put up a notice to call the attention of the public to it, then the public could not have complained. Whatever were its duties to the farmers who had built the crossing, it was under none to the public. But if defendant took up this crossing without putting up barriers or something to notify the public, then, if the public had been using it much, the plaintiff can recover, provided the deceased was free from negligence. The deceased was bound to use such reasonable and ordinary care as a prudent man would use at such a crossing. The crossing having been maintained by the defendant, the deceased had a right to suppose that it was in a reasonably safe condition, that is, such condition as it was in before; but he was bound not only by what he had seen, but by what he did see there, and he was bound to keep such lookout for danger as an ordinary person would do under the same circumstances." To the giving of these instructions, defendant duly excepted.

Plaintiff had a verdict January 12, 1892, for \$4,500. Defendant moved for a new trial, and being denied, it appeals.

- J. H. Mitchell, Jr., and Tilden R. Selmes, for appellant.
- W. B. Douglas and Davis, Kellogg & Severance, for respondent.

Collins, J. The plaintiff's intestate, her husband in his lifetime, came to his death through the negligence of defendant railway company, it is claimed, and in this action, which was brought to recover for the alleged wrongful killing, plaintiff had a verdict. The facts as established on the trial were that, when living, the deceased resided with his family on a farm in a prairie country about one v.53m.—30

mile east of defendant's line of railway. On the morning of February 18, 1890, he left home with a pair of horses attached to bob sleighs to go several miles northwesterly for a load of wood, to obtain which he had to cross to the west side of said line of railway. Leading in the direction he had to go was a generally traveled wagon road, which crossed the railway about five miles from his residence. This road, at least where it crossed the track, was not a regularly laid out highway, but it, including the crossing, had been used by the public for several years. Immediately after the railway was constructed, some five years before the accident in question, two farmers residing in the vicinity had prepared the crossing by digging the approaches, and by placing planking inside and outside the rails. The defendant's section men took charge of the crossing at once, repaired the planking, replaced the same as needed, and otherwise kept the same in proper condition for travel, as fully as if it had been a legally laid out or established highway. The evidence was abundant upon this point, and also that the traveling public had very generally crossed the railway at this place while it had been maintained, preferring it to other crossings on either side. The planking between the rails before mentioned had been kept in place continuously from the time it was first put in until about one month prior to the day on which Lillstrom received his injuries, and was then removed by defendant's section men to prevent the accumulation of snow at that point, and thus facilitate the operation of the railway. No sign was put up, or barriers erected, to notify the traveler of this removal.

On the trial it was shown that, in his lifetime, Lillstrom had used this crossing, and when it was in good repair. It appeared that he crossed at another place when going for the wood, and it was not shown that he had been at this crossing at all after the planks were taken up, until he was injured.

The 19th of February was a stormy day. About 4 P. M. a neighbor discovered Lillstrom lying upon the ground, then covered with snow, at this crossing. His horses, attached to the bob sleighs with one trace only, stood on the west side of the rails. One single-tree was broken. Upon the sleighs was a heavy load of wood. He had evidently approached the place along the road from the west, (the railway running north and south,) for the rear bob stood west

of the rails in the traveled track, while the forward bob stood lengthwise and upon the rails, faced to the south. Lillstrom lay across the rails in front of the forward bob. He was conscious, and said that he had broken his neck. His injuries were such as to cause his death the following day.

1. It is contended by defendant company that because the crossing in question was not upon a public highway, regularly laid out or established, it owed no duty to the public to keep it in repair, and therefore was not guilty of negligence when removing the planking from between the rails. As hereinbefore stated, the evidence was plenary that the crossing was openly and notoriously used as such by the public, and that defendant had recognized it as such by permitting the public to use it. It had assumed to maintain a crossing at that point for years, and all of the time had encouraged its use by keeping it in repair. It owed the duty of reasonable care to those using the crossing, and was bound to exercise precisely the same precautions to keep it in repair as if it was in fact upon a legally laid out or established highway. Kelly v. Southern Minn. Ry. Co., 28 Minn. 98, (9 N. W. Rep. 588.) To the same effect are the cases of Ewen v. Chicago & N. W. Ry. Co., 38 Wis. 634; Barry v. New York Cent. & H. R. R. Co., 92 N. Y. 289; Murphy v. Boston & Albany R. Co., 133 Mass. 121; and Taylor v. Delaware & H. Canal Co., 113 Pa. St. 162, (8 Atl. Rep. 43.)

The question of defendant's negligence was properly one for the jury to pass upon.

2. It is further contended by defendant company, even if its negligence be established, that there was no testimony tending to connect the accident which befell Lillstrom with such negligence; in other words, that it was not shown that the removal of the planks was the cause of his death.

We have stated the circumstances under which he was found, and undoubtedly the jurors came to the conclusion that they were warranted in believing that, while Lillstrom was attempting to cross defendant's track at the crossing with a heavy load of wood upon his bob sleighs, the runners of either the forward or the rear bob, or both together, struck the rails, which projected a few inches above the snow, with such violence as to suddenly stop the horses, cause

one singletree to break, three out of the four traces to become detached, and to throw the forward bob at right angles with the one in the rear, all concurring to precipitate Lillstrom, who, as driver of the horses, would naturally sit upon the top of the load of wood. with great force to the ground, across the rails, and in front of his sleighs, where he was found, so injured that he died the next day. The facts as related upon the trial fully justified the jury in believing that the accident happened in this way, and that the removal of the planking was the primary cause of the injuries. necessary for plaintiff to show by an eye-witness exactly how these injuries were received, in order to recover, and that is really what was demanded by defendant's counsel on the argument here. It is not necessary in any action, civil or criminal, that the material facts should be established by direct evidence. In civil cases it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth. 1 Greenl. Ev. (15th Ed.) § 13a.

There was no direct evidence as to the exact manner in which Mr. Lillstrom was fatally injured, but there were circumstances in evidence from which it may be justly and fairly inferred that, when the runners of his sleighs struck the projecting rails, the shock was such as to throw him upon and across the rails with great force and violence. If such be the fair and just inference to be deduced from the evidence, it was sufficient. Indianapolis, P. & C. Ry. Co. v. Collingwood, 71 Ind. 476; Indianapolis, P & C. Ry. Co. v. Thomas, 84 Ind. 197; Hays v. Gallagher, 72 Pa. St. 136.

The case of Orth v. St. Paul, M. &. M. Ry. Co., 47 Minn. 384, (50 N. W. Rep. 363,) cited by counsel for appellant, was altogether different from that at bar.

3. This brings us to a consideration of the claim of appellant's counsel that plaintiff cannot recover because there was no evidence produced upon the trial that Lillstrom was exercising ordinary care and caution when attempting to cross the rails. The presumption is that he was, and that he was not guilty of contributory negligence. Such is the settled law in this state, and the cases cited by counsel are from states in which the opposite rule prevails. There was

nothing in the established facts which tended to indicate that he failed to exercise due care when approaching the crossing, of which he had some knowledge. To be sure, the planks had been removed, and to a careful, or perhaps even to an ordinary, observer, But Lillstrom knew that the crossthis might have been obvious. ing had been kept in good condition, and to some extent was warranted in relying upon this knowledge. It was a stormy day in winter, with snow upon the ground which had drifted in, thus rendering the projecting rails and the absence of the planking less noticeable than would have been the case under other circum-Again, it was a railway crossing where the danger to be apprehended was from approaching trains, and where a traveler who knew of the previously good condition of the way would naturally be paying more attention to the right and left along the track than he would to the road over which he was traveling. But even had Lillstrom known of the defective condition of the crossing before he came to it, or had he then observed it, contributory negligence could not conclusively or necessarily be attributed to him. This would depend upon circumstances. It was not made to appear that the crossing was in so dangerous a condition but that a man of ordinary prudence might have reasonably supposed that. with the snow partially filling the space between the rails, and in the exercise of ordinary care, he could drive over in safety. Nichols v. City of Minneapolis, 33 Minn. 430, (23 N. W. Rep. 868.)

4. We have examined each of the assignments of error not covered by the foregoing, and there are none which need special attention.

Order affirmed.

Vanderburgh, J., did not participate. (Opinion published 55 N. W. Rep. 624.)

JAMES C. WILSON vs. NORTHWESTERN MUTUAL ACCIDENT ASS'N.

Argued May 8, 1893. Affirmed June 12, 1893.

Proofs of Death, by Whom Furnished to Accident Insurance Company.

Where an administrator, with the implied consent of an accident indemnity association, adopts and relies upon the act of a third party, who has filed with such association proof of a claim growing out of the accidental killing of such administrator's intestate, a member of the association, the latter will not be allowed to defeat a recovery upon the ground that it was incumbent on the administrator to file the proof himself, or that he could not, with its implied consent, adopt as his own that filed by such third party.

Classification of Occupations.

Where a certain alleged trade or occupation is not mentioned at all in a manual of classification prepared and adopted by such an association. it is not classed as noninsurable.

Contributory Negligence as a Defense to an Action upon a Policy of Insurance against Accidents.

Where an accident happens, and injuries result to a member of such an association, the certificate being in the form of that held by plaintiff's intestate, a recovery cannot be defeated on the ground of a voluntary exposure to a danger contemplated by the parties. Nor is it a good defense that the accident was caused by the mere carelessness or negligence of the assured.

"Pointing" Held Mason Work.

Held, upon the evidence produced upon the trial, that the jury was warranted in finding that the work in which the assured was engaged when fatally injured was part of the trade or occupation of a brick mason.

Appeal by defendant, Northwestern Mutual Accident Association, from an order of the District Court of Hennepin County, Seagrave Smith, J., made September 17, 1892, denying its motion for a new trial.

The defendant is a corporation organized under the Laws of this State, doing business at Minneapolis, insuring its members against bodily injury caused by external, violent and accidental means. On July 24, 1891, it accepted Snorrie Benson, a brick mason, as a member, and agreed, in case his death should result from such means, to pay his legal representatives within ninety

days thereafter \$1,500. Among the conditions of his insurance were the following: "The insured agrees to give immediate notice in writing to the Association, at Minneapolis, of any accidental injury, stating full particulars thereof, with name, address and number of certificate. If he be injured while engaged in an occupation classified by the Association as more hazardous than that the third in this certificate, the indemnity paid shall be that only of such more hazardous class, or if engaged in an occupation classed as not insurable by the Association, no indemnity shall be paid. This insurance does not cover unnecessary exposure to danger, unless in an effort to save human life. No action at law for recovery hereunder shall be begun until ninety days from the date of filing satisfactory proof of claim, nor unless begun within one year after accident."

On August 18, 1891, while the insured was pointing, cleaning and repairing the brick walls of the West Hotel in that city, he fell from the scaffolding, and was so severely injured that he died therefrom nine days thereafter. Notice and proofs of injury and death were given the Association on September 5, 1891, by Stephen Jones, a friend of deceased. The plaintiff, James C. Wilson, was on November 2, 1891, duly appointed administrator of the estate of the deceased. He afterwards went with his attorney to the office of the Association, and they were there told by S. T. Johnson, the Secretary, that the proofs were sufficient so far as he knew; if anything was lacking he would notify them. No further or other proofs were ever requested. This action was begun on December 14, 1891. The defendant answered that deceased did not follow the occupation of brick mason, but followed that of pointer, which was much more hazardous, and classed as not insurable by it, and that by reason of such misrepresentation it was deceived and the policy was void; that no notice or proofs of injury or death had been made or given it by any one interested or authorized to make or give them; that deceased unnecessarily and knowingly exposed himself to danger by engaging in the work of pointer, and in a place, and upon a scaffold, which he knew to be unsafe, not properly stayed and exceedingly dangerous.

The issues were tried June 13, 1892. The Judge in his charge to the jury said: "If you find that the occupation of the deceased was that of bricklayer or mason, and that pointing is a part of a brick-mason's trade, then there was no such misrepresentation as to his occupation as to render this certificate of insurance invalid." To this charge the defendant excepted. The jury returned a verdict for plaintiff, and assessed his damages at \$1,500. Defendant moved for a new trial, and being denied, appeals.

James O. Pierce, for appellant.

Plaintiff, in his complaint, alleged that he had made due proofs of claim in accordance with the terms of the policy, and defendant, in its answer, denied that proofs had been furnished by any person under the contract. No waiver of this condition by defendant was pleaded. Thus the issue was as to actual performance, and not as to waiver; and under the statute the plaintiff was bound to establish on the trial the facts showing such performance. 1878 G. S. ch. 66, § 109. Not having pleaded a waiver, plaintiff could not prove a waiver, but was limited to proving performance. Mosness v. German-American Ins. Co., 50 Minn. 341; Guerin v. St. Paul Fire & M. Ins. Co., 44 Minn. 20. The defendant objected to the reception of the said proofs of claim and to any evidence relating thereto, and, at the close of plaintiff's case in chief, moved for a dismissal. The action of the trial court was based upon the theory of an adoption or ratification by the plaintiff of the proofs furnished before his appointment.

A stranger to the contract, in no way interested in the insurance, cannot interfere or affect the rights of either party. Proofs of death served by such stranger may be treated as impertinent. Proofs of claim are to be made only by a party interested. Cooke, Life Ins. § 116; Bacon, Life Ins. § 406. The plaintiff must furnish the proofs required as a condition to the right of recovery. Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433; Home Mut. Life Ass'n v. Seager, 128 Pa. St. 533.

Benson's conduct in working upon a swinging scaffold was an unnecessary exposure to danger, and, not being in an effort to save human life, placed his injury wholly outside of the contract, so that no recovery whatsoever could be had upon the policy. The danger was both imminent and obvious. The risk was extreme. A more dangerous kind of employment it would be difficult for

men to engage in, unless possibly it might be ballooning. The dangers of railway operating would be insignificant in comparison. No insurance company could with safety or propriety insure against such risks. The defendant did not insure against them, and did not know that Benson was so exposing himself. Anderson v. H. C. Akeley Lumber Co., 47 Minn. 128; Shaffer v. Travelers' Ins. Co., 31 Ill. App. 112; Sawtelle v. Railroad Pass. Assur. Co., 15 Blatch. 216; 18 Ins. Law J. 892; Tuttle v. Travelers' Ins. Co., 134 Mass. 175; Cornish v. Accident Ins. Co., 23 Q. B. D. 453; Travelers' Ins. Co. v. Jones, 80 Ga. 541; Miller v. Travelers' Ins. Co., 39 Minn. 548; Hull v. Equitable Acc. Ass'n, 41 Minn. 231.

Benson, when injured, was engaged in the occupation of pointer, which occupation was classed by defendant as not insurable, so that, under the conditions of the contract, no indemnity was to be paid. There is a difference between the occupations of pointer and brick mason. The two phrases "pointer," and "brick-mason," are by no means synonymous. The instruction given, which allowed the jury to find that pointing was a part of a brick-mason's trade, was insufficient and misleading, because it disregarded the distinct occupation known as that of pointer. By reason of these errors, the defendant was not allowed fairly to reach the jury with the important feature of its defense, that the occupation in which the insured was injured was one wholly excepted from the provisions of the policy. The court assumed that if it were sometimes a part of a mason's duty to point walls, that would abolish all distinction between the two occupations of pointer and brick-mason. It was entirely immaterial that a mason might sometimes do some of the work of a pointer. This in no respect blended the two occupations into one. If the insured had in fact followed both occupations, he should have so stated in his application. Aldrich v. Mercantile Acc. Ass'n, 149 Mass. 457.

Steele & Rees and W. A. Kerr, for respondent.

Whether it was necessary to plead a waiver of proofs of loss is of no moment now. No objection was made in the court below to the reception of evidence on that ground. Defendant, by objecting to the evidence on specifically stated grounds, waived all objection on other grounds. Both parties considered the questions of ratification, adoption, and waiver of proofs of loss, as issues in the case, and introduced evidence concerning them. Parties to an action can consent to try issues not presented by the pleadings, and where issues other than those raised by the pleadings are tried, it will be presumed that they were litigated by consent.

After plaintiff was appointed administrator, defendant negotiated with him and never asked for further proofs, but presumed, as was the fact, that plaintiff was relying on the proofs which had been received and retained by defendant. American Life Ins. Co. v. Mahone, 56 Miss. 180; Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith, 268; Continental Life Ins. Co. v. Rogers, 119 Ill. 474; Gellatly v. Minnesota Odd Fellows' M. B. Soc., 27 Minn. 215; Newman v. Springfield F. & M. Ins. Co., 17 Minn. 123, (Gil. 98;) Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 546; Vankirk v. Citizens' Ins. Co., 79 Wis. 627.

If the work in which Benson was engaged was dangerous, and his support insecure, and he knew it, he would be voluntarily exposing himself to danger; and the Judge instructed the jury that if they found those facts to exist, they must return a verdict for defendant. But whether or not these facts did exist was a question for the jury. In an action on a policy of accident insurance, negligence or carelessness of the insured is no defense. Providence Life Ins. & Inv. Co. v. Martin, 32 Md. 310; Stone v. United States Casualty Co., 34 N. J. Law, 371.

If Benson was a pointer by trade, the instruction of the court covered defendant's contention; there was abundant evidence to show that pointing was a part of a mason's trade. The question of the two trades of mason and pointer, and whether Benson was one or the other or both, was fully considered by the jury on all the evidence, and they found against defendant. The policy insured Benson against accident on any branch of his business, in pointing as well as in laying brick. Defendant's witnesses testified that brick-masons do pointing. Grattan v. Metropolitan Life Ins. Co.,

80 N. Y. 281; Eggenberger v. Guarantee M. A. Ass'n, 41 Fed. Rep. 172; McGurk v. Metropolitan Life Ins. Co., 56 Conn. 528; Cook, Life Ins. §§ 38, 52, 53.

Deceased was insured as a brick-mason. The insurer must have known that one of the duties required of a brick-mason was pointing. Appellant argues that pointing was not classified by it as insurable. Neither was it classified as not insurable. The manual of appellant and its classification is silent on this occupation.

Collins, J. Plaintiff's intestate, Benson, whose occupation was therein stated as that of a brick mason, held a certificate of membership in defendant indemnity association, when he accidentally received injuries which caused his death soon afterwards. This certificate contained several conditions,—one being that, if Benson should be injured when engaged in an occupation classed as not insurable by the association, nothing should be paid; and another, that a recovery could not be had, under the terms of the certificate, in case the injury received was the result of unnecessary exposure to danger, unless in an effort to save human life. Satisfactory proof of a claim was required as a condition precedent to payment. At the time of the accident, Benson, with other men, was at work upon a swinging scaffold, engaged in "pointing" the walls of an eight-story brick building, the scaffold being suspended from the roof by means of ropes. Between the third and fourth stories of the building there was a projection some three feet wide, and the scaffold had been dropped below this projection as the men progressed downward with their work, which consisted in "pointing" or finishing up the lines of mortar, and replacing defective or broken brick in the walls.

The projection carried the scaffold out too far from the building, and it had been brought back to convenient working distance by means of small guy ropes, one at each end, running from the scaffold to windows. One of the workmen stepped from the scaffold into a window, and immediately after one of these ropes broke, causing the scaffold to swing out several feet, throwing Benson and another workman to the walk below. Fatal injuries were received by the former.

1. It is claimed by defendant that no proof of the claim was presented to it prior to the commencement of this action by plaintiff administrator.

It appears from the evidence that, soon after Benson's death, one Jones, who claimed to be a creditor of his estate, procured a blank form for proof of the claim from defendant association. was filled out and verified by Jones, and filed with the secretary of the association by one of the plaintiff's attorneys. No point is made that the proof was insufficient in form. Soon afterwards plaintiff was appointed administrator of the estate by the proper tribunal, and at once called upon the secretary, in company with the attorney before mentioned, a duly-certified copy of the letters of administration being presented. The secretary was asked if the proof theretofore served was sufficient, and was informed that if further proof was required it would be furnished by the administrator. He replied that the papers then filed were sufficient, so far as he knew, and that if anything was lacking, or if further proof was needed by himself or the association, the administrator or his attorney would be notified. It is conceded that no other or further proof was demanded, and that afterward, prior to the bringing of the suit, the association, by its agents and officers, made several attempts to settle the claim. Its officers knew that the administrator relied upon their statement in respect to further proof, and relied upon, and had adopted, the action of Jones in respect to proof. The association never objected to this, or to paying the claim on the ground now advocated. After the time has expired within which plaintiff, as administrator, could file proof of the claim, and an action has been commenced, the defendant cannot be allowed to defeat a recovery on the ground that it was incumbent upon plaintiff himself to file the proof, or that he could not, with its implied consent, adopt the act of Jones. It is analogous to the reception and retention of defective proof of a claim. In such cases good faith would require that the association give notice indicating the defect, and the failure to object to defective proofs, or a refusal to pay on other grounds, is regarded as an acceptance of the defective proofs, and a waiver of defects. American Life Ins. Co. v. Mahone, 56 Miss. 180; Miller v. Eagle Life & Health Ins. (o., 2 E. D. Smith,

268; Continental Life Ins. Co. v. Rogers, 119 Ill. 474, (10 N. E. Rep. 242.)

But appellant calls attention to the fact that, in the complaint, plaintiff alleged the making and filing of proper proof of the claim by him, which was put in issue by the answer, and that no waiver of full performance of the condition precedent to recovery was pleaded in the reply. Not having pleaded a waiver, plaintiff was limited to proof of performance as alleged in the complaint, is the position of appellant's counsel, who cites Guerin v. St. Paul F. & M. Ins. Co., 44 Minn. 20, (46 N. W. Rep. 138,) and Mosness v. German-American Ins. Co., 50 Minn. 341, (52 N. W. Rep. 932,) in support of the position. We need not consider the condition of the pleadings on this subject, because no objection was made on that ground to the reception of testimony relative to the filing of proof of the claim by Jones, plaintiff's subsequent reliance upon and adoption thereof, with the implied consent of defendant's officers, the statement of the secretary that this proof was satisfactory, so far as he knew, and other statements and acts which estopped defendant association from asserting that satisfactory proof of the claim had not been made. Nor was the point made when defendant moved for a verdict in its favor at the close of the evidence. All questions of ratification, adoption, and waiver of proof, other than that furnished by Jones, were evidently regarded as proper issues under the pleadings, and it is now too late for counsel to insist that they were not. He is concluded by his course upon the trial.

2. The certificate stated that Benson was a brick mason by occupation, as hereinbefore mentioned, and it was claimed by appellant that he was not a brick mason, nor engaged in the work of a mason, when injured; that "pointing" up a wall is no part of a mason's work, and that the occupation of a "pointer" was classed by defendant association as noninsurable; so that, under the conditions of the certificate, no indemnity was to be paid. An attempt was made by appellant to show, by means of a manual pertaining to classification, that the occupation of a "pointer" was classed as noninsurable. This manual has not been made a part of the record and its contents are unknown to us; but, from an admission of counsel made upon the trial in connection with this attempt, it seems that the occupation of a "pointer" was not classi-

fied at all in the same. With this admission it is apparent that such occupation, if there be such, was not classed as noninsurable.

In this connection it may be well to consider the claim of defendant association that the trade or occupation of a "pointer" is not that of a brick mason. There was testimony produced in its behalf, upon the trial, to the effect that these are distinct trades or occupations, but the preponderance of proof was that the work of finishing or pointing up a wall is usually done by masons. On small or common brick buildings the workmen do this as they remove the staging used when laying up the walls; commencing at the top, of course. On large or elegant structures, especially when pressed brick are used for facings, the staging so used is first removed, and then a hanging scaffolding is swung from the top, as it was in this instance, and as the work proceeds the workmen lower themselves by means of ropes and pulleys, exactly as do painters who have occasion to paint the outside of a building. Undoubtedly, in the large cities, where there is an abundance of this special branch of a mason's work, there are men who become adepts in it, and are usually employed in finishing and pointing up walls, precisely as there are men who are engaged in the work of shingling roofs, or putting on lath; and there are probably men who have become skilled as pointers or shinglers or lathers, who could not be put down as brick masons or as carpenters. Yet at the same time the work of pointing is a part of a brick mason's trade, just as the work of shingling a roof or putting on lath is, properly speaking, that of a carpenter. This was clearly established by the testimony, and is a matter of common observation.

3. Counsel argue that, even if pointing up a wall is part of the trade of a brick mason, Benson unnecessarily exposed himself to danger when working upon a scaffold suspended as this was. There is nothing of merit in this argument. When he became a member of defendant association, both parties contemplated that he would be exposed to the danger incident to his occupation. The association was organized for the very purpose of indemnifying persons engaged in trades or occupations in which accidents were imminent, and almost unavoidable, and Benson's object was to secure indemnity in case of accident. When such accident happens, and injuries result, a recovery cannot be defeated on the ground of voluntary

exposure to a danger contemplated by the parties because pertaining to the business of the assured. National Benefit Ass'n v. Jackson. 114 Ill. 533, (2 N. E. Rep. 414.) Yet if the scaffold on which Benson was at work was insecure and unsafe, and he knew it, he would be exposing himself to danger unnecessarily, and in case of accident the defendant would not be liable. These were matters for the jury to pass upon, under proper instructions, and on this feature of the case the court charged as requested by defendant's counsel. Ordinarily, what is due diligence for personal care and safety, in a given case, is for the jury. Stone v. United States Casualty Co., 34 N. J. Law, 371. Nor is it a good defense, in an action of this nature, that the accident was caused by the mere carelessness or negligence of the assured. In cases where the foundation of the action is an injury occasioned by the negligence of a defendant, and the liability grows out of such negligence, it is always a good defense to show contributory negligence on the part of the plaintiff; but here the liability is created by a contract, one of the chief objects of which was to protect the assured against his own mere carelessness or negligence. Provident Life Inv. Co. v. Martin. 32 Md. 310.

- 4. Referring to the defense interposed by defendant, that Benson had unnecessarily exposed himself to danger, the learned trial court erroneously used the words "gross negligence." But this error was at once corrected, for in connection with this language the court gave the very full and elaborate instructions prepared by defendant's counsel, as to what would constitute an unnecessary exposure to danger, within the meaning of the clause in the certificate. This instruction was illustrated by, and referred to, the facts, as shown on the trial, and was enlarged upon by the court in its own language; and there could have been no misunderstanding on the part of the jury as to what would constitute unnecessary exposure to danger, under the certificate, sufficient to defeat recovery. No prejudice resulted from the use by the court of the words "gross negligence."
 - 5. Other assignments of error need not be specially discussed. Order affirmed.

Vanderburgh, J., took no part.

(Opinion published 55 N. W. Rep. 626.)

EDWARD W. BOWEN vs. WILLIAM E. HASKELL et al.

Argued May 11, 1893. Aftirmed June 12, 1893.

Lessee Released from Liability for Rent by Lessor's Consent to Assignment.

A surrender of a lease by operation of law may arise from any condition of facts, voluntarily assumed, incompatible with the existence of the relation of landlord and tenant between the parties; as, for instance, where a new tenant has, by agreement with the landlord, been substituted and accepted in place of the old.

Appeal by plaintiff, Edward W. Bowen, from an order of the District Court of Hennepin County, Chas. M. Pond, J., made December 2, 1892, denying his motion for a new trial.

On March 20, 1890, Malinda Hellen leased to M. Whipple and H. W. Field lots nineteen (19) and twenty (20) in block one (1) in Stillmans' Addition to Minneapolis, for the term of ten years from The lessees agreed to pay \$75 rent per month, payable monthly in advance. The premises were used for a livery barn No. 2815 Nicollet Avenue. On August 15, 1890, Whipple and Field assigned the lease and all their rights thereunder to the defendant William E. Haskell, and he, by writing indorsed upon the assignment, assumed their place and agreed to pay the rent and perform all the conditions of the lease on their part. Mrs. Hellen, by an indorsement on this assignment, assented and agreed thereto. October 15, 1890, Haskell sold and assigned the lease, and all his rights under it, to M. Chambers, who, by writing indorsed on the assignment, assumed to pay the rent and perform the covenants of the lease in the place and stead of Haskell. Mrs. Hellen, by a like indorsement, assented and agreed to this assignment also. Chambers paid the rent to February, 1891. On May 5, 1891, Mrs. Hellen assigned and transferred the rent and all her rights, to the plaintiff, Edward W. Bowen, and he commenced this action February 28, 1892, against Whipple, Field and Haskell to recover the rent which fell due February 1, 1891, and monthly thereafter. Whipple and Field did not answer, but Haskell answered that the lease was, as to him, surrendered by the operation of his assignment to Chambers and Mrs.

Hellen's consent thereto. The issues were tried May 22, 1892. The court made and filed findings stating these facts, and directed judgment to be entered to the effect that plaintiff was not entitled to any judgment or relief in the premises. He moved for a new trial, but was refused.

J. L. Dobbin, for appellant.

Haskell made himself liable for all rents accruing subsequent to the time of the assignment to him. Upon the failure of any subsequent occupant or assignee of his to pay rent to the original lessor, or her assignee, Haskell was liable, and any evidence as to when or how he vacated the premises was irrelevant. Under our view of the case, the acceptance of rent from Chambers, or any one else, would not release Haskell from the liability which he assumed at the time of accepting the assignment from Whipple and Field and making his indorsement on the lease. Davis v. Morris, 36 N. Y. 569; Pfaff v. Golden, 126 Mass. 402; 2 Wood, L. & T. 1034.

Chas. G. Laybourn and Kellogg & Laybourn, for respondent.

The assignment by Haskell to Chambers, by consent of Hellen, released Haskell. Vandekar v. Reeves, 40 Hun, 434; Bliss v. Gardner, 2 Bradw. App. 422; Randall v. Rich, 11 Mass. 494; Levering v. Langley, 8 Minn. 107, (Gil. 82;) Smith v. Niver, 2 Barb. 180; Wallace v. Kennelly, 47 N. J. Law, 242; Woodfall, L. & T. 496, 498.

An assignee of a lease may always discharge himself for subsequent breaches, both as regards the payment of rent and other covenants, by assigning over, even if it be done for the express purpose of getting rid of his responsibility. Taylor, L. & T. §§ 452, 453; Armstrong v. Wheeler, 9 Cowen, 88; Hurst v. Rodney, 1 Wash. C. C. 375; Keeling v. Morrice, 12 Mod. R. 371; Childs v. Clark, 3 Barb. Ch. 52; Valliant v. Dodemede, 2 Atk. 546; Johnson v. Sherman, 15 Cal. 287.

Collins, J. We pass by several questions discussed by counsel, and came directly to the consideration of a finding of fact to the effect that after the lease had been assigned to the rev.53m.—31

spondent Haskell by the original lessees, the lessors consenting, through their agent and attorney in fact, B. H. Hellen, said respondent sold and transferred all of his title and interest in the lease and in the leased premises to one Chambers, who then entered into possession; that said sale and transfer were duly and properly con sented to by the lessors, again acting through their agent and attorney; that they accepted Chambers as their tenant under the lease, in the place of respondent Haskell; that they collected the stipulated rental from Chambers for several months; that respondent never thereafter occupied the premises, and was not called upon to pay rent thereon. This finding, and the sufficiency of the evidence to support it, is not questioned by any of appellant's assignments of error, although the admissibility of certain testimony relative to the sale and transfer by Haskell to Chambers is brought in question by the third assignment. But, even if the trial court erred in its rulings respecting the admissibility of this testimony,-and of that hereafter,—we fail to see how appellant could be benefited, or how he could escape from the conclusive effect of such a finding.

When the original lessors voluntarily consented to an assignment of the lease by the original lessees to Haskell, the lessees were released, and the relation of landlord and tenant no longer existed between the parties. Again, when the original lessors consented to a sale and transfer of all rights and interest which Haskell had acquired under the lease,—an assignment of it, practically,—to Chambers, and accepted the latter as their tenant in lieu of Haskell, the relations which had theretofore existed between the latter and his landlords terminated. There was a surrender of the lease held by Haskell, by operation of law, arising from a condition of facts voluntarily assumed, incompatible with the existence of the relation of landlord and tenant between the parties. The landlords could not be permitted to hold both Haskell and Chambers as lessees; and the facts going to show that a lessor has given up a lessee, and has had nothing more to do with him, and has treated a new occupant as his lessee, may be established by parol. Levering v. Langley, 8 Minn. 107, (Gil. 82;) Woodf. Landl. & Ten. 496, 498.

Appellant's counsel urges that because Haskell agreed, in writing, to pay the rent when the lease was assigned to him, he was something more than a tenant by assignment. When executing the writing, Haskell formally assumed the liability, as to the payment of the agreed rental, of the original lessees; nothing more. He was in no sense a guarantor. No obligation rested upon the lessors to discharge and release either of these parties, but, having done so, they and this plaintiff, their assignee, are bound by their action.

The trial court did not err when making the rulings referred to in appellant's third assignment. There was no effort made by respondents' counsel to show by parol the contents of a written instrument. All of the questions objected to were propounded with a view of showing a fact only,—the fact that Haskell had assigned or transferred his leasehold interests.

Order affirmed.

Vanderburgh, J., took no part. (Opinion published 55 N. W. Rep. 629.)

STATE OF MINNESOTA ex rel. JACOB BARGE vs. DISTRICT COURT OF HENNEPIN COUNTY et al.

Argued May 9, 1893. Decided June 12, 1893.

The Practice Prescribed in 1878 G. S. ch. 84, does not Apply to Actions in District Court.

The provisions in 1878 G. S. ch. 84, as amended by Laws 1881, Ex. Sess., ch. 9, (the forcible entry and unlawful detainer act,) that in actions for recovery of real property held under a written lease after the expiration of the time specified in the lease, restitution of the premises shall be made potwithstanding an appeal, have no application to actions originally brought in the district court.

Original information and petition of Jacob Barge presented April 20, 1893, for a writ of *Mandamus* to the District Court of Hennepin County.

The relator, Jacob Barge, stated that on July 20, 1887, he leased

certain rooms in the two adjoining brick buildings, Nos. 47 and 49 Washington Avenue South, in Minneapolis, to Frederick Scheik, for five years from that date. Scheik agreed to pay \$3,000 a year rent, payable \$250 monthly in advance. He had, by the lease, the privilege also of another subsequent term of five years upon the same terms and conditions, except that the amount of the rent during the second term was to be determined by three disinterested persons, each party to select one, and they to select the third On July 1, 1892. Scheik voluntarily surrendered the rooms in Na. 47, but insisted on a renewal of the lease for the rooms in No. 49. Barge refused to thus renew, and on July 28, 1892, brought an action in the District Court to dispossess Scheik. The defendant answered, and the issues were tried. On March 21, 1893, findings were filed and judgment ordered for Barge. But on the same day Scheik obtained a stay of proceedings to enable him to make and settle a case and take an appeal. On April 1, 1893, Barge moved the District Court to vacate the stay and enter judgment and issue its writ to put him in immediate possession. He based his right to such action upon 1878 G. S. ch. 84, and Laws 1881, Ex. Sess., ch. The District Court denied his motion, being of the opinion that the procedure prescribed by those statutes does not apply to actions brought originally in that court. He prayed this court to issue its writ commanding the District Court of Hennepin County, and the Judges thereof, forthwith to cause judgment to be entered in his favor upon said findings in accordance therewith, and issue its writ of restitution to dispossess Scheik, and put him in possession of the premises, without further stay or delay, on his filing bond as provided by 1878 G. S. ch. 84, § 12, as amended by Laws 1881, Ex. Sess., ch. 9, § 2. This court thereupon made an order that the District Court show cause why such writ of mandamus should not issue. The Judges of the District Court jointly made answer admitting the facts to be as stated in the relation, and showed cause that, in their opinion, the relator was not entitled to imme diate judgment and possession, and that Scheik was entitled to have their decision reviewed, according to the practice on appeal in ejectment. They submitted in this court without argument or brief.

Albert E. Clarke and Wilbur F. Booth, for relator.

The District Court held, in effect, that while it had original jurisdiction of actions of forcible entry and detainer, it could not grant the summary relief which a Justice's Court could grant upon the same facts and under the same circumstances. The relator claims that he is now entitled to the immediate possession of his property, the detention of which has been adjudged to be wrongful, and that his possession cannot be delayed by an appeal to this court. The relator contends that if a suitor institutes his suit in a court of general jurisdiction, instead of a court of limited jurisdiction, it does not have the effect to deprive him of a remedy in the District Court which the court of a justice of the peace would be compelled to grant. The statute does not confer exclusive original jurisdiction of such cases upon courts of justices of the peace. General jurisdiction is conferred on the District Courts by the Constitution. It extends to every case where the Constitution itself does not clearly confer jurisdiction on some other court, including all causes which the Legislature may in its discretion authorize other courts to take cognizance of. Agin v. Heyward, 6 Minn. 110, (Gil. 53;) State v. Kobe, 26 Minn. 148.

This is an action of forcible entry and detainer. The action of forcible entry and detainer is nothing more nor less than an action of ejectment, in which a summary remedy is granted. The sole purpose of its creation was, and is, to afford a summary remedy at law. It is made by statute applicable to actions between landlord and tenant. The only statute applicable to a case of this kind, where the term has expired and consequently the possession of the tenant is wrongful, is the statute providing for the action of forcible entry and detainer, and that is exactly what this action is. Steele v. Bond, 28 Minn. 267; Wright v. Gribble, 26 Minn. 99; Gray v. Hurley, 28 Minn. 388.

Grethen & McHugh, for Frederick Scheik.

COLLINS, J. It must be conceded that the complaint in the action of Barge v. Scheik, which action, originally instituted in District Court, was in ejectment, and also to recover damages for the unlawful withholding of possession of the real property in question,

contained all of the allegations necessary to constitute a cause of action under the provisions of the forcible entry and unlawful detainer act, (1878 G. S. ch. 84, §§ 11–14, inclusive, as amended by Laws 1881, Ex. Sess., ch. 9,) and that the District Court, when ordering judgment for recovery of possession and for damages for withholding possession, found all of the facts required to entitle the plaintiff, Barge, to a writ of restitution had his action been brought and determined, as provided in said statute, in a court of a justice of the peace.

In case it had been so brought and determined, there could have been no stay of proceedings which would have delayed the issuance of a writ of restitution, nor would an appeal by defendant, Scheik, have had that effect. A writ of restitution could have been issued, and the complainant put in immediate possession of the premises. So that the question now before us is whether the course of procedure prescribed for the conduct of actions in justices' courts, and under that statute, the complainant being successful, can be followed, and the very summary remedy known as the "writ of restitution" awarded and issued where the action has been instituted in District Court in the nature of ejectment, all of the essential facts being present and found.

The theory upon which counsel for the relator urge his right to have granted the relief sought by this proceeding is that, as the District Courts of the state are courts of general jurisdiction, having original jurisdiction in all cases, except as otherwise provided by the constitution, such jurisdiction has not been exclusively conferred upon courts of justices of the peace in actions of forcible entry and of unlawful detainer; that the District Courts also have jurisdiction; and that, as all of the facts required to maintain an action under ch. 84, § 11, supra, were set forth in the complaint in Barge v. Scheik, and were found by the court, it was actually an action under that statute, in which Barge was entitled to every remedy provided therein.

The action of forcible entry as well as of unlawful detainer is a statutory proceeding, the practice and procedure being prescribed and regulated as for justices' courts. It is an expeditious and summary way of reaching persons who make forcible entry upon lands, or who, having entered peaceably, unlawfully hold over after their

right so to do has expired. Upon justices' courts, and upon some municipal courts by later legislation, jurisdiction over the subjectmatter, and in this particular form of action, has been conferred, but there is nothing in chapter 84 indicating an intention to permit this form of proceeding in District Courts. In fact the various provisions of the statute relating to the procedure repel the idea of such an intent, and render it impossible to pursue the remedy in District Courts. Such courts have jurisdiction, and exercised it in Barge v. Schiek, to try and determine the same question, namely, a plaintiff's right to recover possession of demised premises, but, necessarily, in accordance with the practice and procedure in ordinary civil actions. That a court of inferior jurisdiction is empowered to proceed and to reach the same result in a more summary manner is no reason for asserting that a court of superior jurisdic-Nor can it be said that by the tion can use the same methods. provisions of chapter 84 jurisdiction in excess of that possessed by District Courts has been conferred upon courts of justices of the peace, for it is not a question of jurisdiction at all. It is simply one of practice and procedure. The landlord from whom a tenant withholds possession of the leased premises after his term has expired may proceed in ejectment in District Court, and, according to the course of practice in those courts, being there permitted to recover possession and also damages for the withholding, in the same action. Or he may pursue in a justice's court the more summary method provided in chapter 84, in which case he waives, for the time being, his right to recover damages for the wrongful detention. The choice of tribunals and remedies is open to him, precisely as it is in certain actions for the recovery of money, or in replevin, where the sum claimed or the value of the property in controversy does not exceed \$100. If the plaintiff chooses, he may bring his action in justice's court, where the proceedings are simple, the trial speedy, and the entry of judgment cannot be stayed by mere order of the justice; or he may resort to the District Court, where the procedure is much more formal, the trial not so quickly reached, and where the court may, within a reasonable discretion, exercise its power, and stay the entry of judgment and other proceedings. We agree with the court below, and are of the opinion that the section in chapter 84, supra, as amended, providing that in actions for the

recovery of real property held under a written lease after the expiration of the term specified in the lease, restitution of the premises shall be made notwithstanding an appeal, does not apply to actions originally brought in District Court.

The order to show cause is discharged.

Vanderburgh, J., absent, took no part herein. (Opinion published 55 N. W. Rep. 630.)

CHARLES N. PROUTY vs. MORRIS L. HALLOWELL, JR., et al.

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Submitted on briefs May 16, 1893. Aftirmed June 12, 1893.

Case or Bill of Exceptions Necessary to Show Errors Occurring During a Hearing.

Application of the rule that error cannot be alleged upon, nor irregularity or misconduct of the trial court shown (on appeal) by, any statement of what took place at the trial contained in the finding of facts or decision filed by the trial judge.

Practice on Application for a Receiver under Insolvency Statute.

The rule of the district court relative to the hearing of orders to show cause upon affidavits, solely, has no application on the trial or hearing of a petition for the appointment of a receiver under the insolvency laws of this state. The court, upon the trial or hearing of the petition, should proceed upon the merits, receiving such evidence as may be pertinent, without regard to the manner in which the alleged insolvent has been brought into court.

Appeal by petitioner, Charles N. Prouty, from an order of the District Court of Hennepin County, *Chas. M. Pond*, J., made July 14, 1892, refusing to appoint a receiver in insolvency of the property of Morris L. Hallowell, Jr., and Samuel P. Snider.

On April 29, 1892, Prouty presented to the District Court a petition supported by affidavits, and obtained an order requiring Morris L. Hallowell, Jr., and Samuel P. Snider, co-partners, to show cause before the court on May 7, 1892, why a receiver should not be appointed of all their nonexempt property, on the ground of their insolvency, under Laws 1881, ch. 148, § 2, as amended by Laws 1889, ch. 30, § 2. The affidavit stated facts showing that Hallowell &

Snider were insolvent, and were owing Prouty \$21,000 and interest; that within the previous ninety days, five judgments had been recovered against them for the aggregate amount of \$30,000; that within the same time they had paid debts amounting to over \$247,000 by selling and conveying property to certain preferred creditors; that they still owed about \$300,000, and were disposing of the residue of their property to certain creditors, with a view of giving them a preference over the petitioner and other creditors.

In answer, Snider filed his affidavit denying insolvency, and stating that he and Hallowell had paid more than \$500,000 of their debts since the beginning of the year, and still had ample property with which to pay the residue, but had been unable to pay some of their debts promptly as they matured, and denied that they intended to prefer any creditor over another. He stated that they intended to pay all in full in a short time. The hearing on the application was adjourned by consent from time to time until July 2, 1892. time Snider sold to Prouty property in payment of a large part of his claim, and then tendered to him \$1,750 in payment of the bal-At the hearing he made and submitted affidavits of these ance. Prouty claimed the tender was not sufficient, and offered facts. evidence in support of the facts stated in his petition, but the court declined to hear oral evidence, and discharged the order to show cause, and dismissed the proceedings. The decision was embodied in a lengthy order reciting the proceedings and the material facts stated in the various affidavits and the admissions of counsel and the rulings of the court on the different offers and applications in From this order Prouty appeals. the proceedings. No case or bill of exceptions was made or filed, showing the evidence received, or offered and rejected, or the rulings upon questions submitted during the progress of the hearing, or the exceptions, if any, to the rulings.

C. C. Joslyn and J. O. Pierce, for appellant.

There was no trial or hearing on the merits in the lower court. The case was simply dismissed on a motion of respondents to vacate and dismiss appellant's petition and all proceedings thereunder. This was a preliminary motion made at the very beginning of the hearing, and the court did not hear the petition upon its merits, and

consequently there was no granting or denying of the petition. The determination of the motion adversely to appellant was equivalent to a dismissal of the petition. Hence no case or bill of exceptions was necessary to show what occurred.

Cross, Carleton & Cross, for respondents.

There is no case containing exceptions or any bill of exceptions in the return to this court. It is true that the trial court states that the petitioner offered to support his application by evidence, and objected to hearing the petition upon affidavits; but, as neither the offer nor the objection is properly incorporated in any settled case or bill of exceptions, the statement of such things in the order cannot be considered by this court. Neither any offers of evidence nor objections to evidence or mode of trial, made by the appellant's attorney at the hearing, can be reviewed by this court, because there is no settled case or bill of exceptions before the court. Stone v. Johnson, 30 Minn. 16; Coolbaugh v. Roemer, 32 Minn. 445; D. M. Osborne & Co. v. Williams, 39 Minn. 353; Baker v. Byerly, 40 Minn. 489; Kohn v. Tedford, 46 Minn. 146.

Collins, J. Upon the affidavit and petition duly made by the attorney for the plaintiff in the above-entitled action, (which was then awaiting trial,) the court issued its order that defendant show cause, at a specified time and place, why a receiver should not be appointed under the provisions of the insolvency laws of this state. Both parties filed other affidavits bearing upon the matter, and, after a number of continuances, a final hearing was had, July 2, The court thereafter made and filed findings of fact and conclusions of law to the effect that defendants were entitled to have the order vacated and discharged. It also vacated and discharged said order and all subsequent proceedings. Plaintiff's counsel appeal directly from the order, and the record presented to us consists, according to the certificate of the clerk of the court below, of the before-mentioned affidavits, the order to show cause, and the findings or decision of the court. There is no certificate of the judge before whom the proceedings were had, and who passed upon the petition, nor has a case or a bill of exceptions been settled, so far as we are informed. Treating the petition as setting forth a proper

ease for the appointment of a receiver under the provisions of Laws 1889, ch. 30, § 2, we are unable to see how, on the record, the alleged action of the district judge in refusing to take testimony offered by the petitioner at the hearing can be reviewed. As preliminary to the findings of fact, the judge stated that the counsel offered to support the petition with proof, and objected to a trial of the matters involved upon affidavits; but this is insufficient to bring the question before us. This was a fact occurring at the trial, not a matter of record, and, although stated in the findings or decision, is not reviewable on appeal. What took place at the trial cannot be made to appear by the findings of fact or by the decision. D. M. Osborne & Co. v. Williams, 39 Minn. 353, (40 N. W. Rep. 165.) and cases Even if this were not so, the assignments of error relative to the right of the petitioner to introduce testimony in support of his petition could not properly be considered here, because it nowhere appears that the court was called upon or made any ruling whatsoever on the offer or the objection. Again, it elsewhere appears in the decision or findings that the latter were made upon the affidavits presented and read by the parties, "and from the admissions then made in open court." If, from these admissions, the court was as fully informed of the facts as it would have been had oral or documentary evidence been submitted,—and in the absence of any showing to the contrary we cannot presume that it was not,—there was no mistrial of the matters alleged in the petition. We have no doubt that on the order to show cause, which practically amounted to nothing more than a "short notice," the court should have tried the case on its merits, receiving such evidence as was pertinent, unless waived or rendered unnecessary by the acts or admissions of the The rule of court relative to the hearing of orders to show cause on affidavits, solely, has no application in the trial or hearing of a petition for the appointment of a receiver under the insolvency laws, no matter how the alleged insolvent may be brought before the court.

Order affirmed.

VANDERBURGH, J., absent.

(Opinion published 55 N. W. Rep. 623.)

Application for reargument denied June 80, 1893.

CHARLES PAGE et al. vs. MILLE LACS LUMBER CO.

Argued May 2, 1893. Reversed June 12, 1843.

Redress for Private Injury from Public Nu sance.

A nuisance, such as an unreasonable and unnecessary obstruction of a navigable stream, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom, distinct and apart from the common injury.

Streams Navigable for Floating Logs Governed by Rules for Highways.

Persons using such streams for the driving of logs must do so with due deference to the rights of other parties engaged in the same business, and in most respects such streams are governed by the same rules as are highways upon land.

Facts Stated—Showing Special Injury.

Plaintiffs were engaged in driving logs of their own, and, under contract, logs belonging to other persons, down a navigable stream, to their own mill and to market, having to pass through defendant's mill ponds and by its mill, its booms, and sorting gaps. There was testimony introduced upon the trial tending to show that by means of its ponds and booms, and the manner in which its own logs were handled and placed in storage booms, defendant maintained a nuisance in its mill ponds, and unreasonably and unnecessarily obstructed and delayed plaintiffs' driving operations. Held, that the latter had shown special injuries differing in kind, not merely in degree or extent, from those suffered by the general public.

On Motion for Rehearing. July 19, 1893.

A Return by the Inferior Court is Necessary to Give This Court Jurisdiction.

Where it appears that the hearing of an appeal was on what purported to be a return from the district court, but that in fact no return had been made, the order entered on such hearing will be set aside, as the court had no jurisdiction.

Appeal by plaintiffs, Charles Page and E. S. Page, from an order of the District Court of Mille Lacs County, D. B. Searle, J., made September 8, 1892, denying their motion for a new trial.

The plaintiffs are partners in lumbering at Anoka, near the mouth of Rum river. The defendant, Mille Lacs Lumber Company, is a

corporation engaged in the business of logging and the manufacture of lumber at Milaca on the same river about seventy-five miles above Anoka. In furtherance of its business, defendant built a saw mill at Milaca on the east bank of Rum River, and opposite its mill built a low dam across the river, and, at a point one-half mile above, constructed another, capable of raising a head of water from eight to ten feet in height, the flowage of which extended over half a mile up stream therefrom. At the head of said flowage it built piers on opposite sides of the channel of the river forty feet apart. From these piers down to the upper dam it drove a row of piling on each side of the channel, and connected them with boom sticks, so as to form a channel from forty to seventy feet in width from the piers down to this dam. The space between this channel and the shores of the pond it used to store its logs for manufacture in its sawmill. About 800 feet above the upper dam it constructed sorting gaps for conducting into its side booms its own logs from the main drive in the channel. At this sorting gap a plank crossing was made over the channel, on which five or six men were stationed by defendant to detain and separate its logs from those of the plaintiff, and others coming down the river in the driving season. The river, in its natural state, is about two hundred feet wide at this point. Defendant owned the land on both shores. This upper dam is provided with two sluice-ways, each about ten feet wide. It is also provided with eight gates, intended for the purpose of venting surplus water. The logs of each owner are marked with the owner's mark. To enable defendant to sort out its own logs, it had to detain all, and examine the marks, and guide its own through the sorting gaps into its side ponds. During the years 1890 and 1891, all the logs coming down the river were stopped at the piers, and a jam of logs was there formed, and the logs detained through the driving season. The logs were thereafter pushed out of the jam by plaintiffs, and floated and driven down through the channel and over the dams to the river below. They employed a crew of forty men, fifty days in this business, at an expense of three dollars a day for each man engaged. To drive logs successfully above Milaca, artificial improvements were necessary. The ordinary driving season lasts about sixty days, commencing in April and ending in June. The logs cut above Milaca constituted

the sole available supply for plaintiffs' mill at Anoka. All the logs comprised in the drives in both said years were in charge of the plaintiffs, except those belonging to defendant. In 1890, the plaintiffs had in their drive 388,337 logs, scaling 56,133,710 feet, of which they owned 8,000,000 feet. In 1891, plaintiffs had 194,861 logs in their drive, scaling 27,252,070 feet, of which they owned 6,000,000 feet.

By reason of the narrowness of the sluice-ways in the upper dam, and the height of the deadhead under them, the water did not flow through them with sufficient rapidity to create a draft or current in the channel above the dam, suitable and strong enough to bring the logs by the force of the current down through the channel to the sluice-ways, and did not at all times vent sufficient water to carry along the logs below the dam after they were sluiced through it, and a large force of men was required to push and pole plaintiffs' logs along through the channel and sluice-ways and into deep water below the dams.

This river has been used for more than twenty-five years, and never before had there been a failure to drive the logs. and 1891, there was the usual stage of water in the driving season. and of the usual duration. In the absence of defendant's dams and other works, plaintiffs' entire drive of logs could and would, in the opinion of experts examined as witnesses, have been driven over that portion of the river in two days. Had defendant's dams and other works been properly constructed and operated, plaintiffs' drive of logs would not have been delayed one-half as long as they were, and a smaller force of men would have been required. Only a portion of the logs reached Anoka in 1890, and none of them reached there in 1891. The plaintiffs were employed by other owners to drive their logs, and were by their contracts to be paid only when the logs reached Anoka, thereby the plaintiffs lost the use, for a year, of over \$20,000 compensation for driving logs for others, and their mill stood idle. The reasonable value of the use of their mill was \$100 a day. By adopting the plan of catch-marking its logs, and by establishing and using more sorting gaps, and by widening and lowering the floors of the sluice-ways, and arranging its log channel so as to conform more nearly to the natural channel of the river, the work of passing the main drive through its works would be very much expedited, and in fact accomplished in half the time required and consumed in 1890 and 1891.

The plaintiffs brought this action in August, 1891, to recover \$25,-000 damages sustained by them by reason of defendant's obstructions in the river. At the close of plaintiffs' evidence, the court, on defendant's motion, dismissed the action, and plaintiffs excepted. They afterwards moved for a new trial. This was denied, the court saying: "The relief, if any, is by a public prosecution for the abatement of a public nuisance. The stream is a public highway passing over defendant's property, and the plaintiffs, with their logs, mere travelers thereon, having no greater rights than the general public. The damages they sustained were precisely the same in kind, differing only in degree, as those sustained by every other person travelling the same highway. They are damages for which the law affords no redress by private action. This is settled in this state by Swanson v. Mississippi & R. R. Boom Co., 42 Minn. 532, and Lummers v. Brennan, 46 Minn. 209. There is no doubt plaintiffs have suffered hardship, and were it not for the settled rule in this state, it would seem they are entitled to relief."

After the decision of this appeal, the defendant presented in this court affidavits showing that the return filed here was not in fact made and certified by the clerk of the District Court, and asked that the decision be vacated, and the return stricken from the files. An order was granted requiring the plaintiffs to show cause why this should not be done. At the hearing, on July 19, 1893, an order was made granting the defendant's motion.

W. Hammons and Chas. Keith, for appellants.

This court has in Miller v. Chatterton, 44 Minn. 338, substantially announced the law applicable to this case, and placed itself in line with the holdings of the courts of last resort in the great lumber states.

The case of Stetson v. Faxon, 19 Pick. 147, is cited with approval by many law writers. It contains a large collection of authorities, all of which support the position contended for by plaintiffs. See, also, Davis v. Winslow, 51 Me. 264; Gerrish v. Brown, 51 Me. 256; Veazie v. Dwinel, 50 Me. 479; Dudley v. Kennedy, 63 Me. 465; Mc-

Pheters v. Moose River Log Driving Co., 78 Me. 329; Watts v. Titta-bawassee Boom Co., 52 Mich. 203; Weise v. Smith, 3 Oreg. 445; Enos v. Hamilton, 27 Wis. 256, 24 Wis. 658; Sullivan v. Jeruigan, 21 Fla. 264; Sewall's Falls Bridge v. Fisk, 23 N. H. 171; Fultz v. Wycoff, 25 Ind. 321; Gifford v. McArthur, 55 Mich. 535. See, also, Cooley, Torts, 732; Gould, Waters, 182; 2 Parsons, Contracts, 460; 2 Eng. & Am. Encyc. 470; Bishop, Noncontract Law, § 424; Hilliard, Torts, 112.

One of Minnesota's leading industries is the logging and lumber business. Millions of dollars of capital and thousands of men find steady employment in it. All of the states similarly situated have, in cases of this kind, awarded to the injured party substantial damages. It would be a calamity to this industry, far-reaching and disastrous in its consequences, if this court should hold that conduct, such as the evidence tended to establish, may be freely indulged in by any person without fear of being compelled to respond in damages to the party injured. These appellants respectfully ask this court to reconsider Swanson v. Mississippi & R. R. Boom Co., 42 Minn. 532, and Lammers v. Brennan, 46 Minn. 209.

Eller & How, for respondent.

Upon this appeal it is not necessary for the defendant to vindicate the character of its works. Plaintiffs failed to make out any cause of action for which relief can be afforded in a private action. The most that can be claimed is, that the works are a public nuisance in a public highway, and an interference with the traveler's right of free passage thereon. The only wrong suffered by the plaintiffs was an interference with their right of free and unobstructed travel. The injury, if any, was only to that public right of passage that plaintiffs possess in common with the general public, to freely travel on this highway with their logs. The defendant owned the shore and bed of the stream, and was in fact the possessor of all the rights that might be enjoyed in connection with the stream at that point, subject only to the public easement. The rule applicable in such case is old and well settled that no private action can be maintained for injuries resulting from the invasion of a mere public right, such as the right to travel a highway, unless

the damages sustained are special in their character and peculiar to the individual injured. They must differ in kind, and not merely in degree, from those suffered by others who may travel the same highway. They must be the result of some act, that, in addition to being a public wrong, also operates as an invasion or interference with private rights. This rule must be regarded as settled in this state. Swanson v. Mississippi & R. R. Boom Co., 42 Minn. 532; Lammers v. Brennan, 46 Minn. 209; Aldrich v. Wetmore, 52 Minn. 164.

For similar applications of the same principle elsewhere, see Blackwell v. Old Colony R. Co., 122 Mass. 1; Blood v. Nashua & L. R. Corp., 2 Gray, 137; Brightman v. Inhabitants of Fairhaven, 7 Gray, 271; Thayer v. New Bedford R. Co., 125 Mass. 253; South Carolina Steamboat Co. v. South Carolina Ry. Co., 30 S. C. 539; Winterbottom v. Lord Derby, L. R. 2 Ex. 316.

Collins, J. When plaintiffs rested their case upon the trial the court dismissed the same on the ground that the testimony introduced was insufficient to sustain the action. A motion for a new trial was afterwards denied, and the questions involved are before us on a bill of exceptions. From this bill it appears that both parties have been engaged in lumbering for several years upon Rum river, a stream navigable for logs and timber. Both parties cut their logs on the upper waters, and drive them to their respective mills, there to be manufactured into lumber. The plaintiffs' mill is at Anoka, the defendant's about 75 miles above it, at Milaca; and it follows that plaintiffs' logs must be driven past the point at which defendant's are taken from the stream and manufactured. The only practicable way in which either of these mills can be supplied with logs is by driving them down the said river. Just above its mill the defendant company constructed two dams across the river, about a half mile apart, the natural result being to create a pond and slack water above each, the slack water in the upper pond extending about 3,000 feet above the upper dam. In this pond the defendant placed piers, piling, and boom sticks, so that a path or way was made from 40 to 70 feet wide, leading from about where the slack water began directly to the dam, and crossing the original channel of the stream twice. Side booms were v.53 m. -32

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put in by defendant on either side of the way, and at a convenient place a sorting gap, and all logs coming down the river had to pass men in defendant's employ, stationed at the gap, whose business it was to guide logs bearing defendant's marks into these side booms for storage, and to allow all other logs to pass on. Between the dams there was piling and booms. The inevitable result was to delay and detain plaintiffs' and all other logs destined for points below defendant's mill. In the years 1890 and 1891 these plaintiffs were engaged for themselves, and, under contract, for other persons, in making what is called a "clean drive" of the river. It is unnecessary to go into the details as to the exact manner in which it was done, but the testimony produced by plaintiffs on the trial tended to show that by reason of the piers, piling, booms, boom sticks, and dams before mentioned, and the way in which defendant's employes performed their work above and at the sorting gap. and appropriated the river for the storage of defendant's logs, the passage of the logs which plaintiffs were driving was unnecessarily impeded and obstructed, and that plaintiffs were unreasonably and oppressively hindered and delayed in their driving operations, to their great damage; the object of this action being to recover the amount of such damages.

It is apparent that the learned trial judge, although convinced that by reason of the maintenance of a public nuisance in the river a wrong had been committed for which plaintiffs should have redress, felt constrained to dismiss the action on the authority of two recent cases,—Swanson v. Mississippi & R. R. Boom Co., 42 Minn. 532, (44 N. W. Rep. 986,) and Lammers v. Brennan, 46 Minn. 209, (48 N. W. Rep. 766),—and we are obliged to admit that, if reliance could be placed on our views as to the proper application of a wellsettled rule of law to a given state of facts as expressed in Swanson v. Mississippi & R. R. Boom Co., he was fully justified in his ruling. While differing somewhat on the facts, the present case cannot be distinguished from that, and the rule there announced as applicable and controlling, preventing a recovery by the plaintiff, if rightly applied on that occasion, would be equally as pertinent and equally as determinative on this. But we are now convinced that an error was committed in the application to the facts in the Swanson Case of the salutary and well-established rule that an individual cannot maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public, and that it is only when he sustains special injury differing in kind, not merely in degree or extent, from that sustained by the general public, that he may recover damages in a private action; and an examination of the opinion recently filed in Aldrich v. Wetmore, 52 Minn. 164, (53 N. W. Rep. 1072,) will indicate that we then had doubts of the correctness of the decision in Swanson v. Mississippi & R. R. Boom Co.

In the opinion in Aldrich v. Wetmore, supra, most of the cases in this court bearing on the subject, and many others, were referred to and discussed, and we are not inclined to again go over the ground.

It is obvious that there has been a very marked conflict of opinion in the application of the rules pertaining to the rights of private parties to have redress in private actions when injuries have grown out of public nuisances, and as to where, on the facts, the line should be drawn. This conflict, and that the adjudicated cases are irreconcilable, is well shown in Stetson v. Faxon, 19 Pick. 147; Farrelly v. City of Cincinnati, 2 Disney, 516; and in Wood, Nuis. ch. 19.

That a nuisance, such as an unreasonable or wanton obstruction of a navigable stream, a public highway, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom. distinct and apart from the common injury, need not be demonstrated by illustration. The public wrong inflicted upon all persons must be redressed by a public prosecution, and the private injury by an appropriate private action. An obstruction to a highway, although it be an infringement upon the rights of the general public. in the nature of a public nuisance, may be, and frequently is, productive of special and particular damage to a private individual; and it would be highly unjust and inequitable to say that he has no right of redress in a private action, on the ground, merely, that the injury had resulted from an act which is a public offense in itself, and because other persons might have been injured and damaged in the same manner and to the same extent, had they met the obstruction under like circumstances. Such is not the law. general doctrine in reference to the use of navigable streams as public highways is that each person has an equal right to their reasonable use. What constitutes a reasonable use depends upon the circumstances of each particular case, and no positive rule can be laid down to define and regulate such use with precision, so various are the subjects and occasions for it, and so diversified the relations of the parties therein interested. The defendant had the right, as had the plaintiffs, to use the river as a highway for the purposes of navigation, and, as an incident to this, the right to secure its logs in side booms, although the inevitable result would be to temporarily obstruct the logs of other persons destined for a mill or market further down the stream. And we have no doubt of its right, in a reasonable manner, to erect piers and dams, and to put in piling, and attach boom sticks, and also to maintain side booms for the storage of logs; but it was not authorized by the construction of piers, dams, booms, or boom sticks, or by the management of either, or of a sorting gap, to unreasonably or oppressively obstruct or blockade the way. It must use the stream with due deference to the rights of others, and in most respects streams used for highway purposes are governed by the same general rules of law as are highways upon land. No general rule can be laid down for determining whether a pleading shows, or whether the evidence produced upon a trial tends to establish, a case under the principle or rule that, to maintain an action for a wrong or injury arising out of the maintenance of a public nuisance, an individual must have sustained special injury differing in kind, not merely in degree or extent, from that sustained by the general public; and we shall not attempt it. It is well discussed in Aldrich v. Wetmore, supra. We are of the opinion that the case now under consideration was brought within the rule, and that the evidence tended to show that plaintiffs had suffered a special and particular injury. injury, the direct result of an unreasonable detention of their logs by means and methods for which defendant company is responsible, was wholly distinct and different in kind, not merely in degree and extent, from that sustained by the general public.

A private action can be maintained to redress this injury, not-

withstanding there is also a remedy afforded the public. In principle the plaintiffs' rights cannot be distinguished from the individual rights considered in Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 41, (11 N. W. Rep. 124,) and in numerous other cases in this court, where an action to redress a private wrong, growing out of a public nuisance, has been declared the proper remedy. Attention is called to Brown v. Watson, 47 Me. 161, and Enos v. Hamilton, 27 Wis. 256, in which the exact question now before us has been discussed briefly, and passed upon. Both cases support the conclusion herein reached, and the one last cited has been approved in at least three later cases in the same court. That it has been the common practice to bring actions at law not distinguishable from that at bar, and also in equity, and to prosecute them to a successful termination, will be seen from an examination of the following: Powers v. Irish, 23 Mich. 429; Watts v. Tittabawassee Boom Co., 52 Mich. 203, (17 N. W. Rep. 809;) Gifford v. McArthur, 55 Mich. 535, (22 N. W. Rep. 28;) Enos v. Hamilton, 24 Wis. 658; Clark v. Peckham, 10 R. I. 36; Blanchard v. Western Union Tel. Co., 60 N. Y. 510; Hughes v. Heiser, 1 Binn. 463; Weise v. Smith, 3 Or. 445; Laucey v. Clifford, 54 Me. 487; Dudley v. Kennedy, 63 Me. 465; McPheters v. Moose River Log-Driving Co., 78 Me. 329, (5 Atl. Rep. 270;) Frink v. Laurence, 20 Conp. 117.

Order reversed.

VANDERBURGH, J., absent, took no part herein.

MITCHELL, J. I concur in the result, and do so more especially on the ground that, for the purposes for which plaintiffs were using the river, (driving logs,) it was their only highway for getting their timber to their mill.

(Opinions published 55 N. W. Rep. 608.)

On Rehearing. July 19, 1893.

PER CURIAM. On the hearing of an order to show cause it has been conclusively established that the appeal considered and disposed of in the opinion in the above-entitled action was so con-



sidered and disposed of on a pretended return; no return, in fact, having been made by the clerk of the district court. This was not known to this court, of course, until after the opinion had been filed, nor was it within the knowledge of respondent's counsel. As the court had no jurisdiction of the cause, it is now ordered that the pretended return be stricken from the files, and that the order heretofore made, whereby the order of the court below denying plaintiffs' motion for a new trial was reversed, be set aside and vacated.

(Opinion published 55 N. W. Rep. 1119.)

JOSEPH W. HOSMER vs. MARY R. HOSMER.

Submitted on briefs April 14, 1893. Affirmed June 16, 1898.

Finding of Fact Supported by the Evidence.

A finding of fact that the charge of desertion made by plaintiff in his complaint for divorce was not established or proven on the trial keld sustained by the record.

Appeal by plaintiff, Joseph W. Hosmer, from a judgment of the District Court of Waseca County, *Thos. S. Buckham*, J., denying him a divorce from the defendant, Mary R. Hosmer.

The appellant's third assignment of error was as follows:

"3rd. The court erred in not granting plaintiff a divorce."

A. J. O'Grady, for appellant.

M. R. Everett and H. S. Gipson, for respondent.

Vanderburgh, J. The plaintiff sues for divorce on the ground of desertion. The divorce was refused by the court for the reason that the charge was not satisfactorily proven. The desertion is alleged to have occurred on September 15, 1887, and the court finds that since that date the parties have lived separate and apart continuously, owing to a trifling quarrel at that time, and that neither of them has ever attempted to make up such quarrel, or become reconciled to the other, or to resume marital relations, but they have

been mutually satisfied with existing relations, without making any serious charges of misconduct against each other. The appellant makes three assignments of error. The third is too general, leaving only the first two to be considered.

The first raises the question whether the findings of fact are justified by the issues made by the pleadings. The question of inconsistency in the defenses set up was not raised at the trial. The issue of desertion was fully and fairly tried on the merits, without objection, and this court would not now entertain the objection new made, even if it would have been available in the trial court. But there is really no inconsistency. The failure of the defendant to establish her defense or counterclaim is not necessarily an admission of the plaintiff's case. The court was entitled to consider all the material evidence bearing upon the issue of desertion raised by the plaintiff, and to decide that issue upon the merits as it did do.

The second assignment is that the conclusions of law are not justified by the evidence. It is sufficient that the conclusions of law are justified by the findings of fact. But the question argued by both parties, and probably actually intended to be raised, is whether the latter are supported by the evidence. The record of the testimony is manifestly not complete in details. It was made up by counsel from memory after the trial, and purports merely to contain the substance of the evidence.

The trial court was in much better position to pass upon the testimony elicited before it than this court can be upon this record. The defendant denies in her testimony, substantially, that she left plaintiff without his consent, and that she ever refused to live with him. On the contrary, she testifies that he told her to go; that she must not interfere in a certain matter; and that, if she could not refrain from doing so, she could leave.

The evidence in the case is conflicting, and the defense is not very clear or satisfactory, perhaps, but upon the record before us we do not feel justified in disturbing the decision of the trial court,

Order affirmed.

(Opinion published 55 N. W. Rep. 630.)

MICHAEL C. DEAN vs. St. Paul & Duluth Railroad Co.

53 504 55 125 Submitted on briefs April 14, 1893. Reversed June 16, 1823.

Assignee of a Part of a Single Claim Protected.

An assignment of a part interest in a demand or obligation may be made, and the courts will recognize and protect the equitable interest of the assignee.

But Separate Actions cannot be Maintained.

But a separate and independent action cannot be maintained by such assignee, to recover his share of the debt, where the debtor refuses to consent to, or recognize, the assignment.

Parties to the Action.

An entire demand cannot be made the subject of several different actions. There can be but one suit, in which all persons interested must be made parties plaintiff or defendant.

Appeal by defendant, St. Paul and Duluth Railroad Company, from a judgment of the District Court of Pine County, F. M. Crosby, J., entered December 3, 1892, against it for \$27.98.

One C. E. Peterson was at work for defendant as brakeman during March, 1892, for which it owed him \$50.53. He owed the plaintiff, Michael C. Dean, five dollars for board, and gave him an order upon the Railroad Company for that amount. The Company returned the order to plaintiff, saying it declined to collect claims against its employes. On April 15, 1892, Dean commenced this action against the Railroad Company before William Ginder, a Justice of the Peace of Pine County, to recover the five dollars, and on May 12, 1892, he obtained judgment. Defendant appealed to the District Court on questions of law alone. There the judgment of the Justice was affirmed, the Judge saying: "I think it must be held in this state, and that it ought to be held everywhere, that an assignee of a part of an entire demand may maintain an action upon it. See Canty v. Latterner, 31 Minn. 239; Risley v. Phenix Bank, 83 N. Y. 318." Defendant appealed to this court.

J. D. Armstrong and Lusk, Bunn & Hadley, for appellant.

We ask the court's attention to a case involving a trivial sum, but an important principle, and a serious nuisance to those who employ very numerous servants. The law applicable was stated in the leading case of Mandeville v. Welch, 5 Wheat. 277. The rule in this case has been generally followed and approved. It was indorsed by this court in Lewis v. Trader's Bank, 30 Minn. 134, and in Canty v. Latterner, 31 Minn. 239. The case of Ris'cy v. Phenix Bank, 83 N. Y. 318, cited by the learned District Judge, in no way goes to support this action. It is not questioned that partial orders and assignments may bind the debtor when the custom of trade shows the debtor's consent, as in case of checks or orders on a bank. It is not disputed that, under the Code, the real party in interest must sue. But this proves only that assignor and assignee, in case of partial assignments, must join in the suit. The assignee can no more sue alone for his interest in the debt than the original creditor could have brought two actions, each for a part of the debt. The same rule that no one shall be twice vexed for one and the same cause forbids either proceeding.

While it is true, as suggested by respondent, that his complaint does not state a cause of action, still a failure to make the objection is not prejudicial, as questions of law may be raised at any time during the trial. The question of law here is, that plaintiff's evidence did not make a case.

It is not necessary that the return show a request to the justice for a transcript of the evidence, provided it affirmatively appears that all the evidence is in fact returned. Hinds v. American Express Co., 24 Minn. 95; Smith v. Force, 31 Minn. 119.

The certificate of the justice shows the return of certain papers numbered 1 to 8, the evidence and exhibits being numbered 4, 5 and 6. The justice certifies that said papers, together with the foregoing transcript, contain, "a full, correct and complete statement of all the proceedings and the evidence had before me in said cause." Proceedings before a justice are liberally construed, and the certificate is sufficient. Payson v. Everett, 12 Minn. 216, (Gil. 137;) Smith v. Force, 31 Minn. 119; Plymat v. Brush, 46 Minn. 23.

Robert C. Saunders, for respondent.

The question of law raised should have been raised by objection to the complaint that it contains no cause of action. 1878 G. S. ch. 65, § 33.

The return of the justice does not purport to contain a true transcript of all the evidence given at the trial, nor does it affirmatively show that the transcript of the evidence is returned upon the request of either party to the suit. The transcript of the evidence is not properly made a part of the return, and the appeal should be dismissed. 1878 G. S. ch. 65, § 116; Hinds v. American Express Co., 24 Minn. 95.

1878 G. S. ch. 66, § 26, authorizes the assignment of things or parts of things in action arising out of contract. Partial assignments of a thing in action arising out of contract are not excepted in the body of this section, nor enumerated in the proviso. The Act is remedial and enlarging, and should be liberally construed. Aside from the statutory validity of partial assignments and the statutory direction that the assignee sue in his own name, the tendency of the best considered modern cases is to uphold such assignments. 1 Am. & Eng. Encyc. Law, 833, 834; 2 Morse, Banks & B. §§ 494, 500.

Mandeville v. Welch, 5 Wheat. 277, has frequently been questioned, and is cited by Morse as favoring the contention that a draft operates as an assignment. No intervening rights complicate this case. The simple question is, can the assignee of a specified sum, payable out of a designated fund, enforce payment from the debtor of the assignor?

The alleged "serious nuisance" arising from the adoption of the principle contended for by respondent, cannot for a moment stand against the manifest injustice and striking inequity of the rule insisted upon by appellant.

Vanderburgh, J. One Peterson, who was in the employment of the defendant, was entitled to \$50, the amount of his wages for March, 1892. On the 1st day of that month he gave an order to plaintiff, upon the defendant, directing the payment to him of \$5, and to deduct the same from the amount of his wages for March. This order, after due presentation, the defendant refused to recognize or pay.

It was determined in Canty v. Latterner, 31 Minn. 242, (17 N. W. Rep. 385,) in accordance with the weight of authority, that an assignment of a part interest in a demand or obligation may be

made, and that the courts will recognize and protect the equitable interest of the assignee.

But the court did not hold that, as against the debtor or obligor, a separate and independent action might be maintained by the assignee, to recover the amount of his interest, or that a single demand could be split up and enforced in that way by the assignee, severally, so as to subject the debtor to sundry different actions, where he has not consented to the assignment. No such burden can be imposed upon the maker of a single, entire contract. cannot, against his consent, be compelled to deal with a plurality of creditors, and be subject to be harassed by a multiplicity of suits. The case of Risley v. Phenix Bank, 83 N. Y. 318, does not hold a different doctrine. The court there say: "The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of a part of an entire demand might subject the creditor to several actions has much less force under a system which requires all parties in interest to be joined as parties to the action." There can be but one action upon a single demand. The parties interested must join as plaintiffs, or those not joined must be made defendants, in the action, so that the whole controversy may be determined in one suit, unless the creditor agrees to a severance, as by the acceptance of an order, or otherwise. The assignee of a part interest cannot be permitted to carve out of the entire demand the amount of his claim, leaving other parties to bring separate actions for their several interests. See Field v. Mayor of N. Y., 6 N. Y. 179, and National Exch. Bank v. McLoon, 73 Me. 510, where the questions involved herein are fully The case of bank checks is distinguishable, for manifest discussed. reasons.

The justice returned the evidence in the case, and certifies that the papers returned, and the transcript contain a full, correct, and complete statement of all the proceedings and the evidence in the case; and this is the record upon which the decision in the district court, sought to be reviewed here, was made. The record is sufficient to present the questions raised here. The pleadings show the nature of this action, and the certificate, by fair intendment, shows that all the evidence was returned.

The justice having so returned the evidence the record of it cannot now be objected to because it fails to show that there was no formal request made that it should be returned. Smith v. Force, 31 Minn. 121, (16 N. W. Rep. 704.)

Judgment reversed.

(Opinion published 55 N. W. Rep. 628.)

BETSEY WROLSON vs. SIMON ANDERSON.

Submitted on briefs April 21, 1893. Affirmed June 16, 1893.

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Jurisdiction Acquired by Consent of Parties.

An unauthorized appeal to the District Court was taken from the judgment of a justice of the peace. The parties appeared in the district court, submitted to its jurisdiction, amended their pleadings, and consented to a trial of the case on a day fixed. *Held*, that the district court acquired jurisdiction to hear and determine the case on its merits, notwithstanding the irregular mode in which the case was brought into that court.

Appeal by plaintiff, Betsey Wrolson, from a judgment of the District Court of Stearns County, D. B. Searle, J., entered July 9, 1892, dismissing her action.

The plaintiff commenced this action before J. A. Berg, a Justice of the Peace at Belgrade, against Simon Anderson, defendant, to recover \$20 damages for trespass on her land and cutting wood thereon without her consent. She obtained judgment December 13, 1889, for just \$15, damages, and \$25.05 costs. appealed to the District Court upon questions of both law and fact. He failed to enter his appeal on or before the second day of the May Term in 1890. Thereupon the plaintiff entered it, and had judgment affirming that of the Justice. Defendant soon after excused his default, and the court on August 30, 1890, vacated the judgment against him, and set the action for trial at the next On December 1, 1890, the defendant moved for leave to file an amended answer, and plaintiff asked leave to file an amended complaint. Both motions were granted, and the new pleadings

were filed. Whereupon the case was by consent of both parties set for trial by jury. On the next day plaintiff moved to dismiss the appeal, on the ground that the District Court never acquired jurisdiction, as the judgment was for only \$15 damages, and did not exceed that sum. 1878 G. S. ch. 65, § 113. This motion was denied, on the ground that both parties had appeared in the District Court, and submitted to its jurisdiction. The action was then tried in May, 1891, and plaintiff had a verdict for \$16.73. Defendant moved upon the minutes of the court for a new trial, and it was granted, because the verdict was not supported by the evidence.

The action was again noticed, and placed on the calendar for trial, and was reached for trial on May 28, 1892. The defendant was ready, and moved the trial, but the plaintiff being unprepared objected, and asked that the action be dismissed for want of jurisdiction. The court refused this motion, and granted the motion of defendant that the action be dismissed for want of prosecution, and that he recover of plaintiff his costs and disbursements. These were afterwards taxed at \$128.25, and judgment entered in his favor. From this judgment plaintiff appeals.

Bruckart & Brower, for appellant.

G. W. Stewart, for respondent.

Vanderburgh, J. Judgment was rendered in justice's court against the defendant and in plaintiff's favor for the sum of \$15 damages and costs. The case was appealed to the District Court upon questions of both law and fact.

The appellant having failed to enter her appeal on or before the second day of the term of the district court, judgment was ordered for the plaintiff respondent. Afterwards the defendant moved upon affidavits to vacate the order for judgment, and to reinstate the case on the calendar. The plaintiff appeared on the hearing, and resisted the application, which was, however, granted. On the 1st day of December, 1890, at a regular term of the court, the plaintiff applied for and obtained leave to amend her complaint, and defendant also amended his answer, and thereupon by consent of both parties the case was set for trial on the merits in the district court for December 9, 1890. Afterwards, upon December 2, 1890, the plaintiff moved to dismiss the appeal, which motion was denied, and

the case was thereafter tried by jury, and a verdict rendered, which was afterwards set aside, and a new trial awarded; and at a subsequent trial the action was dismissed on defendant's motion, for want of prosecution by the plaintiff.

It is now claimed by the plaintiff on this appeal that the judgment of dismissal was invalid for want of jurisdiction of the district court of the cause because the judgment of the justice, being for \$15 damages, and not in excess of that amount, the case could not be brought to trial de novo on appeal in the district court. But the district court has original jurisdiction without respect to the amount in controversy, and had jurisdiction of the subject-matter of this action, if the parties voluntarily appeared and submitted the contro versy to the court, which it is very clear they did do. pleadings were amended, and the case voluntarily set for trial, it was to late to move to dismiss, and the irregularity in the mode of bringing the case into that court in the first instance was waived. The parties appeared in the district court, and consented to the trial of a controversy, the subject of which was within the jurisdiction of the court. Why should the court stop to inquire into the preliminary procedure? The question involved is substantially covered by the cases of Lee v. Parrett, 25 Minn. 128, and Anderson v. Hanson, 28 Minn. 402, (10 N. W. Rep. 429.) And see Danforth v. Thompson, 34 Iowa, 243; Mackey v. Briggs, 16 Colo. 143, (26 Pac. Rep. 131.) Since the trial court was, strictly speaking, concerned only with the issues raised by the pleadings under which the trial was conducted, it is not material to inquire as to the effect of that trial upon the judgment attempted to be appealed from.

But we think it but reasonable to hold that the effect of such retrial was to abrogate such judgment by the implied consent of the parties.

Judgment affirmed.

(Opinion published 55 N. W. Rep. 597.)

ELLEN KNIES vs. E. P. GREEN.

Submitted on briefs May 1, 1893. Affirmed June 16, 1898.

Appeal by plaintiff, Ellen Knies, from a judgment of the District Court of Hennepin County, Seagrave Smith, J., entered January 23, 1892, against her and in favor of defendant, E. P. Green, for costs.

- C. E. Brame, for appellant.
- A. Q. Rogers, for respondent.

VANDERBURGH, J. The question involved in this appeal was considered and determined in the case of *Wrolson* v. *Anderson*, ante, p. 508. (55 N. W. Rep. 597,) (decided at the present term.)

Judgment affirmed.

(Opinion published 55 N. W. Rep. 598.)

M. O. LITTLE et al. vs. Judson W. LEE.

Submitted on briefs April 21, 1893. Reversed June 16, 1898.

Burden of Proof.

Where a complaint shows that a contract or obligation is joint, and also sets up facts showing that the liability thereon had been assumed by one of the obligees or debtors, and he is accordingly sued alone, the defendant may raise an issue upon such allegations of fact in his answer, and the burden will thereupon be cast upon the plaintiff to establish them upon the trial, and, if he fails so to do, he will not be entitled to recover upon the joint obligation against the party so named as sole defendant.

Appeal by defendant, Judson W. Lee, from a judgment of the Municipal Court of the City of Minneapolis, Chas. B. Elliott, J., entered December 5, 1892.

The plaintiffs, M. O. Little and Alexander H. Nunn, were partners in business practicing law at Minneapolis, and had been employed as such by Judson W. Lee and E. W. Backus, co-partners, and had acted for them as their attorneys in several actions and matters in which they were interested. On April 19, 1892, the attorneys had a settlement with their clients, and a balance of \$450, was found due the attorneys. The clients soon after paid the attorneys \$200

upon the account. The attorneys brought this action against Lee only to recover the balance. They alleged in their complaint that Lee had agreed with Backus to pay this balance himself, and had so stated to them. The defendant denied this agreement, and alleged payment. On the trial no proof was made of such agreement. To prove payment, defendant offered in evidence the stub of a check drawn by him, payable to plaintiffs, and testified that the check had been destroyed. On objection being made, the stub was excluded, and defendant excepted to the ruling. The plaintiffs had judgment for the amount, and defendant appeals.

Forrest & Wolfe, for appellant.

The plaintiffs cannot recover in this action against this defendant alone, because the account stated and sued upon is a joint liability, being against this defendant and E. W. Backus. There was no necessity for the defendant to plead the nonjoinder of Backus as a party defendant, because from the plaintiffs' own showing, the joint nature of the account fully appeared. Plaintiffs attempted to make defendant liable for the whole debt by virtue of an after agreement that he would pay it all. That agreement was not proven. agreement, if proven, would fall within the statute of frauds, and could not be enforced, because it would be an oral assumption of the debt of another. Having alleged Lee's individual liability, plaintiffs The material fact of the defendant's sole liability is must prove it. not found by the court, and clearly on account of the total absence of evidence to sustain such a finding. The defendant, after proving the destruction of the check sent plaintiffs May 16, 1892, offered in evidence the stub of that check remaining in his check book, or, as defendant calls it, the duplicate of the check sent. This evidence was ruled out by the court on plaintiffs' objection. It was clearly It was secondary evidence in the nature of a memorandum made at the time of the transaction. It had some probative force and weight. We think its exclusion was error.

Little & Nunn, for respondents.

The stub of check was not admissible for several reasons. It showed on its face that it had been changed and altered. It was a mere memorandum not shown to have been made by Lee, or when,

or by whom, it was made. There was no foundation laid for the admission of such evidence. Defendant, having destroyed the original, could not introduce this stub, which was not even a copy, to bolster up his testimony as to payment.

The defendant waived any question of nonjoinder of parties, and cannot now raise that objection. If the defect appeared on the face of the complaint, it could be raised only by demurrer. If the defect did not appear on the face of the complaint, the objection should have been taken by answer. It must be set up distinctly as a defense, and must show wherein the defect consists, and who should have been joined as parties. If not so taken, it was waived. 1878 G. S. ch. 66, § 95; Davis v. Chouteau, 32 Minn. 548; Sandwich M(g. Co., v. Herriott, 37 Minn. 214; Pom. Remedies, § 287.

Vanderburgh, J. This action is brought to recover a balance due upon an account stated, for professional services, alleged to have been performed for the defendant and one Backus, who were therefore jointly liable therefor.

But the complaint further shows that Backus had paid over to defendant his half of the claim for the use and benefit of the plaintiffs, "and upon the agreement and understanding between said Lee and Backus and that said Lee should pay the amount to plaintiffs." The complaint presents on its face the excuse for the nonjoinder of Lee. These allegations are put in issue by the general denial in the answer, which also affirms that the account was stated and agreed on between plaintiffs and defendant and Backus as copartners, and not otherwise. We do not think it was necessary for the defendant to allege formally the nonjoinder of Backus, because the plaintiffs, under the allegations in the complaint, in order to recover against Lee severally, were bound to prove the facts essential to establish a several liability against defendant, Lee, and Backus was thereby shown to be a necessary party, unless the allegations excusing the nonjoinder were proven. But this issue is not covered by the findings of the court.

The court simply finds the joint obligation of Backus and defendant to the plaintiffs, and the balance due thereou.

Under the pleadings, this does not warrant the several judgment ordered against the defendant, Lee.

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The stub of the lost check testified to by defendant was not evidence of the contents of the check. It does not appear when the entry upon the stub was made, or by whom, and upon the question of veracity between defendant and plaintiffs' witness Nunn its correctness and effect as evidence must still rest upon the parol evidence of defendant, identifying it and its contents, so that it did not tend to strengthen his testimony. It was properly ruled out.

Judgment reversed, and new trial ordered.

(Opinion published 55 N. W. Rep. 737.)

HIRAM D. GATES vs. WILLIAM BANHOLZER.

Submitted on briefs April 17, 1893. Reversed June 16, 1893.

Findings Unsupported by the Evidence.

Certain findings of fact held not justified by the evidence.

Appeal by plaintiff, Hiram D. Gates, from an order of the Municipal Court of the City of St. Paul, John Twohy, Jr., J., made February 9, 1893, denying his motion for a new trial of his action against William Banholzer.

Walter L. Chapin, for appellant.

A. E. Bowe, for respondent.

Vanderburgh, J. This action is brought by plaintiff to recover for work and labor and materials furnished in repairing an artesian well for defendant in the year 1886, and a second count sets up another claim for work done and materials furnished in and about the same well in the year 1889. The defense is that the well was dug by plaintiff for defendant in the year 1886, by contract, and that the work and materials for which a recovery is sought in this action were furnished in completion or fulfillment of his duty under this contract, which had never been satisfactorily completed, and so the trial court found.

1. As respects the first cause of action, we think the defendant's contention may be sustained, though the evidence is not very

clear or satisfactory. The defendant called upon plaintiff to make the repairs or changes necessary to the satisfactory operation of the well shortly after the job was done. The evidence tends to prove that the plaintiff undertook to bring the water into the defendant's house above the level of this well by means of a water ram and fixtures. Defendant, finding that it did not operate well, sent word to the plaintiff to come and fix it, which plaintiff promised to do, and thereupon made sundry changes and repairs, which he now sues to recover for. We think there is sufficient evidence in the case to uphold the finding in defendant's favor.

2. But we are unable to say that the defense to the second cause of action is made out.

The plaintiff, having made proof of the performance of the labor and that the materials were furnished as alleged, in the fall of 1889, at the defendant's request, is entitled to recover, unless the defendant establishes the fact by a preponderance of evidence that it was done under the original contract. This, we think, he failed to do on the trial. The evidence tends to show that the water in the well was lowered from a cause common to similar wells in the vicinity, and hence some changes were required in the position of the ram and pipes, and certain of the joints and connections in the pipes had become loose and in disrepair, which was the occasion of plaintiff's being called on; and we do not think it was made to appear that the plaintiff was under an existing obligation to do the work in question by virtue of the original contract, or the manner of its execution.

Order reversed.

(Opinion published 55 N. W. Rep. 597.)

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CHRISTIAN OLSON vs. PETER P. SWENSEN, Sheriff.

Submitted on briefs April 14, 1893. Reversed June 16, 1893.

Evidence of a Title Fraudulent as to Creditors.

Evidence held insufficient to make a case in behalf of plaintiff for the consideration of the jury.

Admissions of Plaintiff are Competent Evidence.

Upon the cross-examination of the plaintiff, his admissions or declarations, made to third parties, touching the ownership of the property in controversy, keld competent.

Declarations of Third Persons not Evidence.

. But evidence of the declarations of third persons, not parties to the suit, respecting such ownership, though in possession of the property, held inadmissible in a suit between other parties involving the title thereto.

Appeal by defendant, Peter P. Swenson, from an order of the District Court of Hennepin County, Seagrave Smith, J., made August 13, 1892, denying his motion for a new trial.

Sidle-Fletcher-Holmes Company, a corporation, recovered a judgment August 17, 1891, in the District Court of Hennepin County, against Samuel Olson and Christine, his wife, for \$239.53 for flour sold them. A writ of execution was issued thereon, and delivered for service to the defendant, who was then sheriff of that county. He levied upon and sold two horses, a top buggy and a canvas-covered wagon to satisfy the judgment.

Their son Christian Olson, the plaintiff, then appeared and claimed the property, and brought this action against the sheriff to recover its value. He testified that he bought and paid for the property at various times two to five years previous to its seizure, and that he left it with his father, a baker, to be used in his "Riverside Bakery" business. Plaintiff was twenty-six years old, unmarried, and lived and worked with his father up to March 1, 1890, when he went to Madelia, and resided there until Christmas, 1891, when he returned, and again lived and worked with his father. He testified that he had an interest in his father's business, but settled with him and got about square with him just before going to Madelia, but

left this property with him. He admitted that he allowed his father to use the property and mortgage it as his own. On cross-examination he was asked if he ever gave a report to the Bradstreet Commercial Agency as to this property, and who owned it, and, if he had, when and what the report was. This was objected to and excluded, and defendant excepted to the ruling.

The plaintiff had a verdict for \$192.60. Defendant made a case containing all the evidence and his exceptions, and it was signed and filed, and on it he moved for a new trial on the ground that the verdict was not justified by the evidence and was contrary to law, and for errors of law occurring at the trial. The motion was denied, and he appeals.

A. H. Noyes and Al. J. Smith, for appellant.

The Sidle-Fletcher-Holmes Co. had been dealing with S. Olson or the Riverside Bakery before the plaintiff went to Madelia. This property had been used by the Riverside Bakery. When plaintiff left, he left the property with the Riverside Bakery, and allowed it to be used as before. Later, as he tells us, he gave his parents permission to mortgage the property. The control and constant use and right to dispose of the property was given by plaintiff to his parents. He knew that all of the property was being used in the business of the Riverside Bakery, and was, tacitly at least, held out to creditors as his father's property. He thereby strengthened the father's credit. The plaintiff is now estopped from denying his parents' title to the property as against such creditors.

Christensen & Tuttle, for respondent.

Appellant claims that plaintiff, by his conduct, was estopped in pais from asserting ownership as against this defendant sheriff and the execution creditor. He let his father have the property to use. Should he be punished for that? Was that negligence on his part? He allowed his father to borrow money on that property; was that negligence on his part as against the sheriff and the judgment creditors? As against the mortgagee there would be no question, but he would be estopped, but the debt upon which the judgment was obtained was incurred long before the mortgage was given, so that any act or negligence on the part of plaintiff in that matter

did not induce the creditor to put itself in a different relation to his parents, nor is there any evidence to show that it gave credit to his parents because of his acts, or any negligence of his.

Vanderburgh, J. The defendant, Swensen, as sheriff, levied on and sold the personal property in controversy, upon an execution issued on a judgment against Samuel Olson and wife, in favor of the Sidle-Fletcher-Holmes Company. The plaintiff, who is the son of the execution defendants, claims that he owned the property, and seeks by this action to recover the value thereof.

Upon the trial he testified that his father was engaged in the bakery business, and the establishment was known as the "Riverside Bakery," and that all the property in question was in the possession of his father, and used in the business of the Riverside bakery; and the name "Riverside Bakery" was painted on the delivery wagon which was so used by him. All the property was used and treated as the property of the Riverside bakery, apparently with his knowledge and consent. He also worked under his father in the business, and the property was furnished for the business, and used in connection with it. He also testifies that he went to work for his father about three years before he went to Madelia, which was in 1890, and says: "I was in as a partner, and was going to get so much out of the partnership before I left him. I did not start in to work for my father as soon as he went into business there. I furnished him the money, and then went to work to drive wagons for him. I started to work for my father about as soon as he started in business,—three years before I went to Madelia. He was baking a couple of weeks before I went in with him. Then I went to work under this deal: These horses were used in connection with that business. One of them was driven on this one of the delivery wagons. The sign 'Riverside Bakery' was painted on that delivery wagon. That was the name of the bakery or business carried on there. My father was owing me money all this time. He is owing me now. When I went to Madelia, we squared up then; was about square." He further "I was acquainted with the manager of the Sidle-Fletcher-Holmes Company before I went to Madelia. The Riverside bakery was dealing with them, and had been dealing with them

some time." In addition to this, he permitted his father to mortgage the property as his own. This evidence by the plaintiff in his own behalf, unexplained or qualified, it seems to us not only warranted, but required, the jury to find that he was interested in the bakery, and that the horses and wagons were not only used in the business, but, as to the public and particularly creditors dealing with the bakery, should be treated as a part of its property and assets. Plaintiff was in the business, furnished money for it, and put the property into the business, and when he quit and went to Madelia, he squared up with his father, and left the property in the business as before. He testified that he was a partner, and, whether the relations between him and his parents were strictly such or not, he ought not to be permitted to dispute that the property in question belonged to the Riverside bakery, or the firm of S. Olson & Co. In this view of the case, the court erred in not directing a verdict for the defendants.

2. The plaintiff was asked on the cross-examination whether he had reported to the Bradstreet Commercial Agency as to the property invested in the business, and to whom it belonged. The ruling of the court sustaining the plaintiff's objection to this evidence is assigned as error.

We think the court erred in rejecting the evidence. It was certainly proper on the cross-examination to inquire of the plaintiff touching his admissions made to third parties in respect to the ownership of this property. It is true that the question did not particularly specify the date of the conversation, but the objection was not rested on this ground.

3. The evidence of the declarations of S. Olson and his wife that they were the owners of the property in controversy were properly ruled out as hearsay, under the issues in this case. They were evidently offered for the purpose of establishing title in them, and not merely as explanatory of their possession. This point was ruled on by this court in a similar case. King v. Frost, 28 Minn. 417, (10 N. W. Rep. 423.) And see dissenting opinion of Dixon, C. J., in Roebke v. Andrews, 26 Wis. 312.

Order reversed, and new trial granted.

(Opinion published 55 N. W. Rep. 596.)

ROBERT B. WHITESIDES et al. vs. ANDREAS M. RUTAN.

Submitted on briefs April 26, 1893. Affirmed June 16, 1893.

Soldier's Right to Additional Land under U. S. Rev. Stat. § 2306, is Assignable.

Webster v. Luther, 50 Minn. 77, followed.

Appeal by defendant, Andreas M. Rutan, from an order of the District Court of St. Louis County, J. D. Ensign, J., made July 28, 1892, denying his motion for a new trial.

The action was to determine adverse claims to lot six (6) in section thirty (30,) and lot three (3) in section thirty-one (31,) T. 63, R. 12, in St. Louis County. The lands are vacant and unoccupied. On March 18, 1881, Wesley Hunt and wife, of Allen County, Kansas, gave a power of attorney to Ralph N. Marble, of Duluth, authorizing him to enter eighty acres for Hunt as an additional homestead, under U. S. Rev. Stat. § 2306, and to sell and convey the land when entered, and receive the consideration. On October 10, 1888, Marble entered in Hunt's name the land above described, and received the certificate of the receiver at the U. S. local land office. On the same day he, as such attorney, made and delivered a deed thereof in the name of Hunt and wife to the plaintiffs, Robert B. Whitesides and Frederick W. Paine. The patent was issued and bore date July 23, 1890.

Afterward, on October 4, 1890, Hunt and wife made a quitclaim deed of the same land to the defendant. The object of this action was to have the claim of defendant under this quit-claim deed adjudged invalid. The trial court so held, and defendant appeals.

J. L. Washburn and Twomey & Morris, for appellant. Jaques & Hudson, for respondents.

PER CURIAM. The points raised in this case are identical with those considered and determined in the case of Webster v. Luther, 50 Minn. 77, (52 N. W. Rep. 271,) after full argument. This case must therefore be held to be governed by that, and the judgment of the trial court in accordance therewith is accordingly affirmed.

(Opinion published 55 N. W. Rep. 540.)

EUGENE OLIVIER ts. GEORGE CUNNINGHAM, (three cases.)

Submitted on briefs April 17, 1893. Reversed June 16, 1893.

Appeal by plaintiff, Eugene Olivier, from a judgment of the District Court of Carver County. Francis Cadwell, J., entered April 9, 1892.

On August 18, 1891, the defendant, George Cunningham, of Watertown in Carver County, purchased in Minneapolis a traction steam engine and threshing machine. In taking them out into the country he ran the engine along Washington Avenue North. Plaintiff's children were out driving with his horse and buggy, and met the engine on the avenue. The horse was frightened and ran away; the children were thrown out and injured, and the buggy demolished. The father brought this action in his own name for injury to Wilfred, one of his children, under 1878 G. S. ch. 66, § 34, which provides that a father may maintain an action for the injury of the child. The venue was laid in Hennepin County. By consent the place of trial was changed to Carver County, where defendant resided, but without prejudice to plaintiff's right to move for a change of venue back to Hennepin County.

On November 9, 1891, plaintiff moved to change the place of trial from Carver County back to Hennepin County for convenience of his nineteen material witnesses. The only opposing affidavit was made by defendant's attorney. Among other things it stated that the defendant had fully stated to deponent the case, and the facts in the case, and the names of defendant's witnesses and the character of their evidence, and that from such statement he verily believed defendant had a good and substantial defense to the action on the merits. The affidavit further stated that defendant had two witnesses in Carver County, but did not disclose their names. It admitted that the cause of action, if plaintiff had any, arose in Hennepin County. The court denied the motion. When the action was reached for trial, plaintiff did not appear, and the action was dismissed. Defendant caused judgment to be entered for his costs. From that judgment this appeal is taken. The only error plaintiff claimed was the denial of his motion to change the place of trial back to Hennepin Three other actions were brought at the same time, two for injury to the other children and one for injury to the horse and buggy. All the actions went through the same course. One of them is reported, 51 Minn. 232. The briefs of counsel were the same in these three cases as in that.

Savage & Purdy, for appellant.

W. C. Odeli, for respondent.

PER CURIAM. In the several cases entitled as above the same questions are presented as were considered and determined in Olivier v. Cunningham, 51 Minn. 232, (53 N. W. Rep. 462,) decided at the last term. They are reversed for the same reason. Statutory costs will be allowed in but one case.

Judgments reversed.

(Opinion published 55 N. W. Rep. 540.)



NELSON OLSEN vs. JOHN PETERSON.

·Submitted on briefs April 20, 1893. Reversed June 16, 1898.

Second Certificate of a Sale Made in 1864 on Execution.

The right to apply for and have a second certificate of sale upon execution from the officer making such sale in certain cases, which was given by Laws 1862, ch. 19, survived the repeal of that chapter, and was saved to the purchaser by 1866 G. S. ch. 121, § 4.

Appeal by defendant, John Peterson, from an order of the Municipal Court of the City of Duluth, *Eric L. Winje*, J., made March 24, 1893, overruling his demurrer to the complaint.

The plaintiff, Nelson Olson, by his complaint, stated that on September 20, 1892, he entered into a contract with defendant to purchase of him the southeast quarter of the southwest quarter of section thirty-one (31,) T. 48, R. 16, in St. Louis County, for \$800, and paid \$150 thereon, to be repaid if title was, on examination, found defective. That the defendant's title was found to be defective. That on July 10, 1864, one J. C. Belz owned the land. That on that day the land was sold on execution issued upon a judgment docketed against Belz. That the sheriff on that day made a certificate of the sale, but it was not recorded in the Registry of Deeds until August 4, 1865. That afterward, on September 10, 1870, the person who was sheriff during July, 1864, made another certificate of the sale as late sheriff, which was recorded on that day, and that defendant's only title to the land is under and through these certificates. That the first is void because not recorded within twenty days after the sale; and the second is void because it was made after the repeal of the Act authorizing a second certificate in such cases. He demanded judgment for the \$150 and interest. To this complaint defendant demurred. The demurrer was overruled, and defendant appeals.

James A. Collins, for appellant.

By the sale the purchaser had a vested right to the property that could be cut off only by redemption, according to the law in force at the time of the sale. All the laws then in force became a part

of that contract. That right accrued and vested, at the time of the sale, and could not be taken away by a future repeal of the law, and was saved to him by the provisions of 1866 G. S. ch. 121, § 4. The right to the certificates was not a mere remedy that could be, or was, taken away, by the repeal of the statute. It was simply a right to evidence of the sale that had been completed, before the law was repealed. In Cable v. Minneapolis Stock-Yards & P. Co., 47 Minn. 417, and Crombie v. Little, 47 Minn. 581, the question of making a second certificate was before this court, and in both cases the certificates were made after the repeal of the statute. Although the effect of the repeal upon the right to make a second certificate was not passed upon in words, the certificates were held valid.

J. J. Squier, for respondent.

Laws 1862, ch. 19, says that if the certificate is not recorded in twenty days it shall be void, but that a new one may be obtained in its stead. This statute was expressly repealed by 1866 G. S. ch. 122, which took effect July 31, 1866. The power to make a second certificate depended solely upon the statute. The whole law was remedial, and the provision giving the person who made the sale, power after he was out of office to remedy the omission and fault of the purchaser in not recording the certificate, was purely curative and remedial, and being repealed, and no similar provision enacted, the second certificate was without any authority of law, and is void. Lambert v. Slingerland, 25 Minn. 457; Bailey v. Mason, 4 Minn. 546, (Gil. 430;) Kipp v. Johnson, 31 Minn. 360; People v. Livingston, 6 Wend. 526; Butler v. Palmer, 1 Hill, 324; 7 Lawson, Rights & R. § 3780; South Carolina v. Gaillard, 101 U. S. 433; Railroad Co. v. Grant, 98 U. S. 338.

Vanderburgh, J. A certificate of sale of the real estate in question upon execution, and in due form, was executed by the sheriff who made the sale on the 10th day of July, 1864. This certificate was not, however, recorded until August 4, 1865. Subsequently, however, on the 10th day of September, 1870, the person who made the sale executed another certificate of the sale—as late sheriff—of that date, and it was recorded on that day. The statute in force when the sale was made (Laws 1862, ch. 19) provided that such

certificates should be void if not recorded in twenty days, but also provided that the person holding such void certificate might have from the officer making the sale another certificate upon paying the stipulated fee, and this without limitation as to the time within which the application therefor should be made.

This chapter of the Laws of 1862 was, however, expressly repealed by 1866 G. S. ch. 122, and the provisions of the latter upon the same subject were prospective in their operation. Hence the respondent argues that in this case the right to apply to the ex-sheriff for a second certificate had lapsed at the time it was executed, because there was then no statutory authority for it, and, the first certificate having been complete and regular in form, the officer was functus officio; and he also contends that the right to such certificate was not saved to the purchaser by the provisions of 1866 G. S. ch. 121. By section 4 of that chapter it was provided that such repeal should not affect any right accruing, accrued, or estab-That provision was certainly intended to cover cases of this kind. The right to a second certificate, if required, was as clearly granted by the act of 1862 as to the first. It was a right to a sheriff's deed, passing the title, and not a mere remedy for the enforcement of such right. It existed when the General Statutes took effect, and is fairly within the saving clause referred to. ficate executed in 1870 was therefore valid, and the title passed upon the record thereof.

Order reversed.

(Opinion published 55 N. W. Rep. 815.)

CITY OF CHASKA vs. JOHN HEDMAN et al.

Argued by appellant, submitted on brief by respondent, June 8, 1898. Affirmed June 21, 1898.

Recovery of Money Unlawfully Paid by a Municipal Corporation.

Where the officers of a municipal corporation pay out its money upon a contract which the corporation has no power to make, the payment is not an act of the corporation, and it may recover the money paid.

Appeal by defendant John Hedman, from a judgment of the District Court of Carver County, *Francis Cadwell*, J., entered December 9, 1892, against him and John M. Carlson for \$4,710.28.

The plaintiff, the City of Chaska, is a Municipal Corporation, having a Common Council. On December 14, 1891, the City Council paid to the defendants, John Hedman and John M. Carlson, \$4,500 as a bonus to induce them to engage in the business of manufacturing boots and shoes in that city. In consideration thereof they constructed a building, put in machinery, and carried on the business as contemplated by the parties. On July 1, 1892, the City brought this action to recover the money. The facts were stated in the complaint, and were not denied by the answer. The defendant Carlson resided in California, and was not served. The defendant Hedman moved the court to change the place of trial to Ramsey County, claiming that he resided in St. Paul. This motion was denied. When the action came to trial the plaintiff moved for judgment on the pleadings and it was granted, the court saying:

"Such payment by the officers of the City was unauthorized and wrongful on their part; all of which the defendants were bound under the law to know, and although the City might bring an action against the officers of the City so misappropriating its funds, still that is not its only remedy. In addition to such remedy the plaintiff can maintain an action against the parties so receiving money misappropriated by its officers. The officers of the City are the agents thereof, and possess such powers and authority as the charter grants them and no more; and all persons dealing with the city officers are bound to know the extent of their authority, and they deal

with them at their peril. Loan Association v. Topeka, 20 Wall. 655; Borough of Henderson v. County of Sibley, 28 Minn. 515; Village of Glencoe v. County of McLeod, 40 Minn. 44; United States v. State Bank, 96 U. S. 30; Coates v. Campbell, 37 Minn. 498."

Bion A. Dodge and Henry C. James, for appellant.

As between individuals and private corporations money paid under mistake of the law cannot be recovered. This court has so held in De Graff v. County of Ramsey, 46 Minn. 319; and Erkens v. Nic-The plaintiff voluntarily paid the sum of olin, 39 Minn. 461. forty-five hundred dollars to defendants upon a contract which is now claimed to be unauthorized by law. There was no mistake of fact, or fraud, or concealment by either party. The question is, whether or not this municipal corporation is under these circumstances excepted from this rule. On this question defendant cites the following: Board of Com'rs of Macon County v. Board of Com'rs of Jackson County, 75 N. C. 240; Commissioners of Catawba County v. Setzer, 70 N. C. 426; Badeau v. United States, 130 U. S. 439; County of Wayne v. Randall, 43 Mich. 137; Advertiser & T. Co. v. Detroit, 43 Mich. 116; Supervisors of Onondaga v. Briggs, 2 Denio, 26; Snelson v. State, 16 Ind. 29; Painter v. Polk County, 81 Iowa, 242.

We further suggest that the plaintiff is estopped. A corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance. Whitney Arms Co. v. Barlow, 63 N. Y. 62.

W. C. Odell, for respondent.

The City Council had no authority to make the contract with defendants, or to appropriate or pay money under it. State v. Foley, 30 Minn. 350; Coates v. Campbell, 37 Minn. 498.

The funds of the City were without authority of law paid to defendants, who were bound to know that the Council had no authority to so pay the same. The City can recover the money thus paid. Borough of Henderson v. County of Sibley, 28 Minn. 515; Village of Glencoe v. County of McLeod, 40 Minn. 44; Loan Association v. To-

peka, 20 Wall. 655; United States v. State Bank, 96 U. S. 30; 1 Am. & Eng. Encyc. 427; Mechem, Agency, 778-783.

GILFILLAN, C. J. This is an action to recover money which belonged to plaintiff, and which its city council paid or caused to be paid to defendants upon a contract between said council and them, according to the terms of which it was agreed that they should establish and operate for a specified period a shoe factory in the city of Chaska, and in consideration thereof the city should pay them the sum of \$5,000. It is conceded that the contract was invalid; that it was beyond the power of the corporation, and, a fortiori, of any officer of the corporation, to make such a contract. It would be hard to conceive anything more foreign to the purposes of a municipal corporation than contracts which provide for the appriation of public moneys to be derived from taxation to the private uses of individuals.

But it is claimed that, conceding all this, the plaintiff cannot recover the money paid on the contract, because the payment was voluntarily made, and with full knowledge of all the facts. general rule, when an individual or private corporation pays money voluntarily with full knowledge of the facts, and without fraud or mistake, it cannot be recovered back, though there was no obligation To give such effect to the payment, however, it must be the act of the individual or corporation; and in this case the payment was not the act of the corporation. It had no authority to make it; no one of its officers, nor all of them together, had authority to make The case stands in law as it would had some person, not connected with the city government, taken the money from its treasury, and paid it to defendants. It may be different in a case where the payment is for a legitimate purpose, within the power conferred on the municipal corporation, and is made by an officer, or upon the direction of an officer, who has authority to determine whether some condition precedent to the authority of the paying officer to pay has As the corporation had no authority to pay been complied with. the money, the payment was not a corporate act, and consequently there is no basis for the doctrine of voluntary payment.

On the motion to change the venue to Ramsey county the affidavits as to the defendant Hedman's residence, whether in the county of Carver or Ramsey, were conflicting, with little preponderance either way, and the finding of the court below on the fact is conclusive.

Judgment affirmed.

VANDERBURGH, J., took no part in the case.

(Opinion published 55 N. W. Rep. 787.)

JAMES W. GRIFFIN US. CITY OF SHAKOPER.

Argued June 8, 1893. Affirmed June 21, 1893.

City of Chaska v. Hedman, ante, p. 525, followed.

Appeal by plaintiff, James W. Griffin, from an order of the District Court of Scott County, *Francis Cadwell*, J., made February 13, 1893, denying his motion for a new trial.

The Russ-Jones Desk Company, a corporation, on October 27, 1891, agreed with the officers of the City of Shakopee to remove its plant to that place, and establish and operate its factory there, and the city agreed to give it a bonus of \$6,000. The Desk Company performed the contract on its part. On December 3, 1891, the City gave the Desk Company \$3,000 in city bonds, and its check for \$3,000 more upon the First National Bank of Shakopee, where the City had the money on deposit. This check was on December 5, 1891, presented for payment, but was not paid. The bank's officers doubted the legality of the contract, and feared to pay. The Russ-Jones Desk Company then commenced this action against the Bank to recover the \$3,000. The Bank obtained an order bringing in the City of Shakopee as codefendant. The Desk Company became insolvent, and James W. Griffin was appointed receiver of its property, and was substituted as plaintiff in the action. The issues were tried July 14, 1892. Findings were made and judgment ordered for defendants. The plaintiff moved for a new trial. Being denied, he appeals.

Chas. J. Robertson and George F. Edwards, for appellant. James McHale and Southworth & Coller, for respondent.

GILFILIAN, C. J. Taking this case in the most favorable aspect for plaintiff,—that is, as an effort by the defendant to recover back money paid,—it is like that of City of Chaska v. Hedman, ante, p. 525, (55 N. W. Rep. 737,) in which we held that it was not a case for the doctrine applicable to voluntary payments. The decision upon that point renders unnecessary the consideration of the other assignments of error.

Order affirmed.

(Opinion published 55 N. W. Rep. 788.)

In re George B. Kidder's Estate.

Argued June 7, 1898. Affirmed June 21, 1898.

A Default not Excused.

To vacate an allowance of a claim against an estate, filed by an administrator on the application of one who knew of the time for hearing, but failed to appear and oppose the claim,—his only excuse for not appearing being that he felt confident that the administrator would administer the estate justly and honestly, and not permit unjust claims to be allowed,—is abuse of discretion.

Appeal by Osgood True from an order of the District Court of Dodge County, *Thomas S. Buckham*, J., made December 28, 1892, reversing an order of the Probate Court.

On March 23, 1891, George B. Kidder, a resident of that county, departed this life intestate, unmarried and without issue. Hissonly heirs and next of kin were O. P. Kidder, his brother, and Osgood True and George True, sons of deceased sister. On May 5, 1891, the Probate Court appointed the brother, O. P. Kidder, administrator of the estate, and made an order that all claims and demands against the estate be presented to that court on or before November 10, 1891, for examination and allowance. Notice of this order and hearing was duly given by publication. On November 2, 1891, O. P. Kidder, the administrator, presented a claim against v.53m.—34

the estate for \$2,741.75. It was filed that day, and on November 10, 1891, it was proved, and, no one opposing, it was allowed.

On July 7, 1892, Osgood True, one of the nephews, made and filed in the Probate Court an affidavit stating that this claim was fraudulent and should not have been allowed; that he first had notice on June 1, 1892, of its presentation and allowance; that although he knew and had notice of the day of hearing proof of claims, he neglected to investigate, on account of the confidence he had in his uncle that he would administer the estate justly and On this affidavit he obtained an order, that O. P. Kidder show cause July 21, 1892, why the allowance of his claim should not be vacated and a rehearing had. On the day appointed the Probate Court made an order vacating its allowance of the claim, and directed that the claim be examined and proofs heard thereon, October 20, 1892. From this order Kidder appealed to the District Court, where it was reversed, and True's application for a rehearing dismissed. True appeals to this court.

S. T. Littleton, for appellant.

Osgood True placed confidence in Kidder that he would in all respects administer the estate to the best interest of all concerned, and not permit unjust or unlawful claims to be allowed against it without notifying him of the filing of the same. We urge that such confidence, if betrayed, furnishes a sufficient excuse for not attending the hearing or investigating the claims. The Probate Court had power to vacate its former order, allowing the claim against the estate, if a reasonable excuse was shown for not appearing and contesting the claim at the time, and if a defense is shown to exist.

Samuel Lord, for respondent.

Appellant apparently takes it for granted that the question for determination in the District Court was, did the Probate Court, in vacating its previous order allowing the claim, abuse its discretion? While respondent contends that the matter was necessarily before the District Court de novo. The only question for determination here is, did the District Court, in deciding the matter, abuse its discretion? Probate Code, § 255.

The only ground upon which the Probate Court is authorized to vacate its former judgment in any case is, that such judgment was procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect. Probate Code, § 252. There has been no sufficient showing of the existence of any one of these grounds.

GILFILLAN, C. J. . The administrator filed a claim against the estate, and on the day appointed for the hearing of claims, of which the appellant had due notice, the claim was heard and allowed. Seven months afterwards the appellant moved in the probate court for an order vacating the allowance of the claim. The only excuse he made for failure to appear and oppose the claim at the time for hearing claims was the confidence he felt that the administrator would administer the estate justly and honestly, and not permit unjust claims (which he alleges this is) to be allowed.

The administrator appealed from the order vacating, to the district court, which reversed the order.

The result must be the same whether we are to consider the district court as exercising a strictly appellate jurisdiction, and called on to determine whether there was error in the decision of the probate court, or the matter was before it as though the motion were made there in the first instance.

Such an application is addressed to the sound discretion of the court. But there must always be some show of excuse for the party's failure to protect his rights at the proper time. To relieve him without such excuse is abuse of discretion. Here there was no excuse. In adversary proceedings no one has a right to rely on the party, whose interests are opposed to his, taking care of his. So that whether the district court were to exercise its own discretion as upon an original application, or merely review the exercise of discretion by the probate court, its decision was correct.

Judgment affirmed.

(Opinion published 55 N. W. Rep. 788.)



ALEXANDER McKillop vs. Duluth Street Railway Co.

Argued June 9, 1898. Reversed June 21, 1893.

Opinion as to Intoxication Admissible.

One who has witnessed a person's acts, appearance, and speech, may express an opinion whether he was intoxicated.

Negligence in Locating Track of Street Railway.

If a street-railway company, without any direction from the municipal council, lays its track in accordance with a grade established for a paving of the street, contemplated, but not yet done, and so laying the track renders the street, until paved, unsafe, it is an act of negligence on the part of the company.

Appeal by defendant, the Duluth Street Railway Company, from an order of the District Court of St. Louis County, J. D. Ensign, J., made December 10, 1892, denying its motion for a new trial.

The plaintiff, Alexander McKillop, brought this action to recover damages for the loss of his left foot on February 4, 1892, under the wheels of one of defendant's electric railway cars, while he was lying after dark on the track. He was at work for the Scott & Holston Lumber Company driving a team and sleigh delivering lumber and mill stuff to its customers. He drove to West Duluth and delivered a load, and claimed that on his return, about seven o'clock in the evening, his team ran away, and the toe of his sled caught against the track of defendant's road, and he was thrown out and rendered sick and dizzy, and in that condition attempted to cross the railway tracks to take a car home; that these tracks were negligently constructed several inches above the then existing surface of the street, and he fell over them and became unconscious, and while lying in that condition was negligently run over, and so injured that his left foot had to be amputated just below the knee. He claimed the motorman should have seen him and stopped the car in time to avoid injuring him.

On the trial defendant introduced evidence tending to show that the plaintiff was intoxicated at the time of the injury, and fell from his sleigh and got onto the track because of that condition. Henry Cody, a witness for defendant, testified that he saw the plaintiff lying in the road just before he was injured. He went to him and picked him up, and offered to take him home, but plaintiff declined, saying he must go and catch his team. He leaned on the witness unsteadily, and staggered as he started off. Witness said he had an opinion whether plaintiff was drunk or not. He was then asked, "What is your opinion upon that subject?" This was objected to as incompetent, irrelevant and immaterial. The Judge sustained the objection. To this ruling the defendant excepted, and offered to show that from the conduct, motion and speech of the plaintiff at the time, the witness thought, and still thinks, that plaintiff was drunk. To this evidence plaintiff objected. The Judge excluded it, and defendant excepted to the ruling.

The defendant then offered to show that its tracks were laid upon a grade established by stakes driven by the city engineer, acting on behalf of the city; that, when the tracks were laid, a contract had been awarded by the city for paving the street on a grade conforming to the rails as laid, and should have been completed in 1891, but was delayed by controversies as to the issuing and sale of city bonds to pay for the work. The plaintiff objected to the evidence, and it was excluded, and defendant excepted to the ruling. This was defendant's fourth assignment of error mentioned in the opinion.

The plaintiff's witness Labby stated that he was conductor on the car following the one that ran onto the plaintiff; that, after the accident, he went to the end of his car for the purpose of ascertaining how far he could plainly discern any object ahead upon the track. He was then asked to state how far he could see plainly any object upon the track there. To this question defendant objected as irrelevant and misleading. The objection was overruled and defendant excepted, and the witness said two hundred feet.

The defendant duly excepted to that part of the charge to the jury specified in the ninth assignment of error. It was as follows: "In this connection it is a fact for you to consider, whether the agent or the motorman of the defendant had knowledge that there was at that time, on the street or on its line of railway, a man who was laboring under some disability, either drunkenness or illness, who was to be watched for, and that care was to be taken to avoid injuring him if found upon the track; and if the defendant or such agent had reasons to apprehend that such a man might be found

upon said tracks, it was his duty to use such care and diligence as would be necessary to secure the safety of such man."

Plaintiff had a verdict for \$2,000. The defendant moved the court to grant a new trial for errors in law occurring at the trial, and excepted to, by defendant. The motion was denied, and it appeals.

Billson & Congdon, for appellant.

There were two substantive facts in controversy: First, whether it was through plaintiff's own negligence, and on account of drunkenness, that he came to be lying upon the railway tracks. Secondly, whether defendant's motorman was guilty of negligence in not seeing the plaintiff sooner, or in not stopping his car more quickly.

It was error for the court to refuse to permit witnesses who saw the plaintiff shortly before the accident, to testify whether in their opinion he was drunk. The authorities are believed to be uniform that upon a question of intoxication, the opinions of nonexpert observers are admissible. Commonwealth v. Dowdican, 114 Mass. 257; People v. Eastwood, 14 N. Y. 562; State v. Huxford, 47 Iowa, 16; Castner v. Sliker, 33 N. J. Law, 96; Alcock v. Royal Exchange Assurance Co., 13 Q. B. 292; Dimick v. Downs, 82 Ill. 570; Stacy v. Portland Pub. Co., 68 Me. 279; Choice v. State, 31 Ga. 424; Pierce v. State, 53 Ga. 365; City of Aurora v. Hillman, 90 Ill. 61; State v. Pike, 49 N. H. 407; McCarty v. Wells, 51 Hun, 171; Lawson, Opinion Ev. 466; Roger, Expert Testimony, 5.

Such testimony is admissible upon grounds of necessity. The acts and utterances of a drunken person fall within that large and varied class of phenomena in which the facts observed by the witnesses are of such a character that it is simply impossible that they should be stated in detail to the jury in such a manner that they shall produce the same impression on the minds of the jurymen that they have legitimately produced upon the minds of the witnesses. Sydleman v. Beckwith, 43 Conn. 9. This is the ground upon which the physical or mental condition or appearance of a person or his manner, habit or conduct may be proved by the opinions of ordinary witnesses founded on observation. This is true upon a question of joy, grief, hope or despondency, Tobin v. Shaw, 45 Me. 331; friend-liness or hostility, Blake v. People, 73 N. Y. 586; fright, whether

of man or of beast, Brownell v. People, 38 Mich. 732; Darling v. Westmoreland, 52 N. H. 401; jest or earnest, Ray v. State, 50 Ala. 104; offensive or insulting manner, (in proof of malice,) Raisler v. Springer, 38 Ala. 703; intemperance and incompetence, Gahagan v. Boston & L. R. Co., 1 Allen, 187; intemperate habits, Smith v. State, 55 Ala. 1. The general principle embodied in all these cases has been repeatedly recognized by this court. Upon this ground it is here held that nonexpert observers may give their opinion, whether a given person is sick or well, Woodcock v. Johnson, 36 Minn. 217; sane or insane, Cannady v. Lynch, 27 Minn. 435.

The court should have submitted to the jury the question whether it was negligence in the defendant company to construct its tracks above the street surface at the point where plaintiff claimed to have been thrown from his sled, and, as bearing upon that question, should have admitted evidence of the peculiar circumstances under which the tracks were laid.

It was error to allow the witness Labby to state the result of his alleged experiment.

The court erred in giving to the jury the charge specified in the ninth assignment of error. The substance of it is, that if the motorman had received information from which he had reason to apprehend that a disabled man might be found upon the tracks, it was his duty to use such care and diligence as would be necessary to secure the safety of such man. This charge makes the company the insurer of the safety of such a man under such circumstances. breaks down all the recognized standards of reasonable care, and substitutes a positive obligation on the part of the company to use whatever care may prove to be necessary to insure the safety of the drunken man. The jury were thus charged, that although the motorman may have used not only such care as a reasonable person would employ under similar circumstances, but the utmost care which the most cautious person would be likely to employ in the face of the most serious danger, the company were, nevertheless, liable if the care exercised by the motorman, proved, in the sequel, to be insufficient to secure the safety of the man. No proposition with reference to the law of negligence could be more transparently unsound and unjust.

Edson & Edson, for respondent.

The court did not err in excluding the opinion of the witness Cody, as to whether from plaintiff's speech, motion and conduct he was or was not drunk. The defendant was seeking to establish contributory negligence upon plaintiff's part, and based it solely upon the claim that plaintiff was intoxicated. The question of intoxication, as bearing upon plaintiff's negligence, was the sole issue presented by defendant, and, for the purpose of sustaining that claim, it had its witness delineate the speech, conduct and motion of plaintiff, and then sought to add the opinion he formed at the time. This would be assuming to determine by the witness' opinion the very question the jury were to pass upon. The witness was not an expert, nor was he shown to have had any previous knowledge of the manner plaintiff would exhibit if intoxicated. He had never before seen plaintiff under the influence of liquor. Wilson v. Reedy, 33 Minn. 503; Tierney v. Minneapolis & St. L. Ry. Co., 33 Minn. 311.

The extent of the rule in cases of alleged insanity seems to be that the nonprofessional witnesses, after delineating certain acts, may state whether from those particular acts he appeared rational or irrational. In *Paine* v. *Aldrich*, 133 N. Y. 544, the court say the tendency is to limit, rather than enlarge, the rule, because, even in its present form, it is conclusion or opinion as to an issuable fact.

In Sowers v. Dukes, 8 Minn. 23, (Gil. 6,) this court held the opinions of witnesses are not competent except where the question is one of science or skill, or has reference to some subject upon which the jury are supposed not to have the same degree of knowledge with the witness; whether a fence is sufficient to turn stock is not such a question.

It was negligence on the part of the defendant to construct its tracks above the surface of the street in such a manner as to render the public highway dangerous for public use. Johnson v. St. Paul & D. R. Co., 31 Minn. 283.

The testimony of the engineer, offered by defendant for the purpose of explaining why its tracks were constructed above the surface of the street, was properly excluded. It did not appear that this engineer had any authority to establish the grade of the street, or that a grade had ever been established.

The court did not err in allowing the witness Labby to state the result of his alleged experiment. He was the conductor upon the first car which followed that which ran over the plaintiff, and his car arrived at the scene of the accident before the car which inflicted the injury resumed its journey. His observation was made as soon as the car in his front had gone on.

The court did not err in charging as stated in the ninth assignment of error. This is only a portion of the court's charge. From it, and the balance of what the court said upon the subject, there was no error.

GILFILLAN, C. J. The court below erred in excluding the opinions of the witnesses that plaintiff was intoxicated. It was hardly a question for expert testimony, so that—the facts and circumstances, his acts, appearance, and speech, being detailed by other witnesses—a witness might be called to state whether, in his opinion, they indicated intoxication, for the matter being one of observation, and not of science or skill, the jury can judge, from the details given, as well as any one, to whom they might be stated. But there are certain conditions, mental or physical, or both together, the indications of which it is impossible for any witness to adequately describe, so that the relation of them shall have on the mind of the jury the same effect that witnessing them legitimately had on the mind of the spectator. In such cases, from necessity, so that the matter may be fully laid before the jury, the spectator may state the effects the acts, appearance, and speech had on his mind; that is, may give his opinion as to the condition they indicated. It is so in respect to joy, grief, hope, or despondency, (Tobin v. Shaw, 45 Me. 331;) friendliness or hostility, (Blake v. People, 73 N. Y. 586;) fright, (Brownell v. People, 38 Mich. 732; Darling v. Westmoreland, 52 N. H. 401;) jest or earnest, (Ray v. State, 50 Ala. 104;) offensive or insulting manner, (Raisler v. Springer, 38 Ala. 703.) So that a person appears to be well or ill, or acts sanely or otherwise. Cannady v. Lynch, 27 Minn. 435, (8 N. W. Rep. 164.) So a witness not an expert, who testifies to acts and declarations showing an opportunity to form an opinion, may give his opinion, based on such facts, or mental capacity. Woodcock v. Johnson, 36 Minn. 217, (30 N. W. Rep. 894.)

That another cause of plaintiff's demeanor was suggested by the evidence made no difference with the propriety of allowing the witnesses to give their opinions as to his intoxication. It was for the jury to determine what caused such demeanor,—an injury or intoxication; and it was necessary, in order to do so, that they have all the evidence before them.

If intoxication was the cause of plaintiff's falling, and lying in a helpless condition, on defendant's track, it was contributory negligence on his part.

The defendant's offer specified in the fourth assignment of error was rightly excluded. A municipal corporation has, through its council, control and charge of the streets, and may regulate the laying of street-railway tracks upon them; and if the council directs the railway company to lay the tracks upon a specified level or grade. and so laying them makes the street unsafe for ordinary travel, the municipal corporation would doubtless be liable for injuries resulting therefrom. But it could hardly be said that so laying them would be an act of negligence on the part of the railway company. The offer did not propose to show any such direction, or even authority, from the council, but only that, the village engineer having indicated by stakes a grade for paving the street contemplated and contracted for, the railway company, in anticipation of such intended paving, laid its tracks in accordance with the grade thus indicated. That the street was, some time in the future, to be brought to that grade, was no authority to the company to at once lay the tracks according to it, if so doing would render the street unsafe, and thus rendering it unsafe would be negligence with respect to any one injured in consequence.

The evidence of the witness Labby, objected to, was proper.

As there must be a new trial, for the error first above specified, it is unnecessary to consider the assignments of error based upon the charge of the court, further than to say that in the part of the charge specified in the ninth assignment the rule of care required of defendant, under the circumstances, might be understood by the jury more strongly than, we suspect, the trial court intended.

Order reversed.

(Opinion published 55 N. W. Rep. 739.)

THOMAS B. O'RILEY vs. ALBERT B. CLAMPET.

Argued June 12, 1898. Affirmed June 21, 1893.

Cross-Examination as to the Contents of a Written Instrument.

It is improper, on cross-examination, to ask a witness as to the contents of a written instrument not in evidence. If the party cross-examining desire to show the contents, and cross-examine upon them, he should, if the instrument be admitted, introduce it, and make it part of his cross-examination.

Pleadings and Judgment as Evidence.

A party's pleadings in an action may be admissible against him in another action, as his admissions; but the judgment in the first action, the parties to the two not being the same, is not admissible, either as an admission, or as evidence of the fact on which it is based.

Appeal by defendant, Albert B. Clampet, from an order of the Municipal Court of the City of Minneapolis, C. B. Elliott, J., made January 17, 1892, denying his motion for a new trial.

The plaintiff, Thomas B. O'Riley, brought this action to recover of defendant \$337, for excavating a cellar on lots seven (7) and eight (8) in block four (4) in Stillman's Addition to Minneapolis. Defendant owned the lots, and on November 1, 1890, conveyed them to Maurice A. Jones, for \$5,000, and took back a mortgage the same day for the entire purchase price. On January 3, 1891, the deed and mortgage were recorded in the Registry of Deeds. On March 31, 1891, defendant assigned the mortgage to Henry P. Lyster, and on April 28, 1891, this assignment was also recorded. On January 19, 1891, plaintiff made a contract with Jones to excavate the earth for the cellar of a block of buildings Jones proposed to construct on these lots. Plaintiff commenced the work January 26, 1891. He soon after heard of the mortgage to defendant, and that Jones was insolvent. He stopped work, and claims he saw defendant and told him the circumstances, and that defendant then promised him to pay for the excavation if he would go on and complete the work, and would assign to defendant a doubtful claim he had for \$114 for work on another lot in which defendant was interested. Plaintiff says he agreed to this, assigned the claim, and completed the excavation. He brought this action to recover of defendant the price. Defendant denied making the agreement. On the trial plaintiff was a witness, and testified to the agreement, and was allowed, over defendant's objection, to prove defendant's ownership of the lots and the deed to Jones and the mortgage back for the purchase price. This is the testimony referred to in the assignments of error two, three and four, and mentioned in the opinion. On his cross-examination plaintiff admitted that on May 14, 1891, he made, signed and verified a statement for a lien on the lots for this claim. It was marked Exhibit 3, but was not offered or admitted in evidence. witness was then asked: "If you were not working for Jones, and did not consider Jones to owe you anything, why did you make Exhibit 3, and therein swear that you did the work for Jones and that Jones owed you thereon \$337?" Plaintiff objected to the question, and the court ruled that he need not answer it. To this ruling defendant excepted. Plaintiff brought an action to foreclose his lien, and all other lien claimants and Lyster and Jones were made parties. Judgment was obtained establishing the liens, but making them subject to the mortgage. Defendant offered in evidence a certified copy of this judgment roll, but on plaintiff's objection it was excluded, and defendant excepted to the ruling. Plaintiff had a verdict for \$336.22. Defendant moved for a new trial, but was denied and he appeals.

A. D. Polk, for appellant.

Christensen & Tuttle, for respondent.

GILFILLAN, C. J. When the defendant, on cross-examination of plaintiff, a witness in his own behalf, asked him, "If you were not working for Jones, and didn't consider Jones to owe you anything, why did you make Exhibit 3, and therein swear that you did the work for Jones, and that Jones owed you thereon \$337?" the paper, though plaintiff had, on its being shown him, testified that he subscribed and swore to it, had not been introduced nor offered in evidence, nor did defendant then offer it, nor state that he intended to offer it, and the question was properly excluded. If a party desires to show the contents of a paper, and to cross-examine upon it, he must, if the writing be admitted, introduce it as part of his cross-examination. 1 Greenl. Ev. §§ 88, 463.

The judgment in the suit of plaintiff against Jones was not ad-

missible. The lien statement, the complaint in that action, and the other papers signed by plaintiff, were admissible as his admissions or declarations. But the judgment was no admission or declaration of his, and, it being between other parties, it was no evidence, in this action, of the facts on which it was based.

The testimony referred to in assignments of error 2, 3, and 4, though not entitled to much weight, was admissible. It tended to show defendant's relation to the property on which the work sued for was done, and that he might be interested in having it done.

Order affirmed.

(Opinion published 55 N. W. Rep. 740.)

STATE OF MINNESOTA vs. HENRY KLUSEMAN et al.

Submitted on briefs June 1, 1898. Affirmed June 22, 1898.

Indictment for Placing Obstructions on Railroad Track.

An indictment for placing an obstruction on a railway track held to sufficiently state the offense.

Juror Improperly Rejected on Challenge by the State.

Where the court, on the challenge of the state, improperly rejects a juror, it will not prejudice the defendant, if he was tried by an impartial jury, and the jury will be presumed to have been impartial if nothing appear to the contrary.

Testimony of the Accused that He did not Know that the Criminal Act was Wrong.

Where one charged with crime is above the age at which capacity to commit crime is presumed, his own testimony that he did not know it was wrong to do the act constituting the crime will not, in the absence of any evidence as to his general mental capacity, tend to remove the presumption.

Henry Kluseman, Frederick Schumacher and Albert Schlenz were indicted in the District Court of Norman County, Ira B. Mills, J., and convicted under Penal Code, § 476, of placing obstructions upon the track of a railway. Questions of law arose upon the trial which in the opinion of the court were so important as to require the decision

of this court. The defendants desiring it, the case was reported so as to present the questions, and certified here. 1878 G. S. ch. 117, § 11.

The defendants were boys fifteen to sixteen years of age. On June 16, 1891, they stole a pint bottle of whisky from the father of one of them, and started on foot to attend a country dance. They drank the whisky on the road, and arriving at the track of the St. Paul, Minneapolis and Manitoba Railway, just before dark, they piled ties in three places on the track, and waited to see the effect on the passenger train from the north then about due. The train was behind time, and the boys went on, before it arrived. The obstructions were discovered, and the boys arrested and indicted. The following is a copy of the indictment:

INDICTMENT.

Henry Kluseman, Frederick Schumacher and Albert Schlenz are accused by the grand jury of the county of Norman, in the state of Minnesota, by this indictment of the crime of malicious injury to railroad tracks committed as follows:

The said Henry Kluseman, Frederick Schumacher and Albert Schlenz on the 16th day of June, A. D. 1891, at the township of Pleasant View, in the county of Norman and state of Minnesota, did wilfully, wrongfully, maliciously and feloniously place an obstruction, to-wit: five piles of large, heavy oak railway cross-ties, all of which piles being within a distance of seven hundred feet upon the track of a certain railway then owned by the St. Paul, Minneapolis & Manitoba Railway Company, a corporation duly organized, created and existing under the laws of the state of Minnesota, and upon which track the Great Northern Railway Company, a corporation duly organized, created and existing under the laws of the state of Minnesota, was then and there operating and running a train of railway cars consisting of seven passenger coaches and one mail car and one baggage car, and that the said railway and said trains were then and there being operated and run by steam by the said Great Northern Railway Company as aforesaid, whereby and by reason whereof, the safety of many persons was then and there endangered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Minnesota.

Dated at the village Ada, in the county of Norman and state of Minnesota, this 10th day of November, A. D. 1892.

JESSE BARNES.

Foreman of the Grand Jury.

The defendants, being arraigned, pleaded not guilty. In impaneling the trial jury, P. H. Aamodt was drawn as a juror, and was challenged by the state for *implied bias*. He had a civil suit pending in the court and to be tried at that term. W. W. Calkins, one of the attorneys defending the boys, was attorney for the juror. The Judge thereupon found the challenge true, and rejected the juror. To this the defendants excepted.

The defendants each offered himself as a witness in his own behalf, and admitted the charge, but each testified that they drank the whisky before reaching the railroad, felt good, and put the ties on the track for fun, to see the train knock them off. Each testified that he did not know that evening, that it was wrong to put the ties on the track, or that they might throw the train off the track.

W. W. Calkins and O. Mosness, for defendants.

The indictment in this case charges that the "defendants did place an obstruction, to-wit: five piles of large, oak railway cross-ties, all of which piles being within a distance of seven hundred feet upon the track of a certain railway," etc. This does not state with sufficient certainty, nor with any certainty, that the piles were placed It seems to us that there can be but two constructions placed upon the language: 1st. That the piles were not upon the track at all, but were within a distance of 700 feet of the track. 2nd. It does not state that they were placed there by defendants, non constat, but that they were on the track before, and that defendants, in placing them, moved them off. It cannot well mean 700 feet along the track, for all the piles constitute but one obstruction. This language is entirely too ambiguous and too uncertain.

"Standing in the relation of attorney and client" cannot be construed to mean, that relation between the juror and the defendant's attorney. The relation of attorney and client must exist between the juror and the accused. The relation intended by the statute

cannot exist unless either the juror or the defendant, is an attorney. 1878 G. S. ch. 116, § 19.

All the facts with reference to the acts and conduct of the defendants at the time of, and after the offense, were put in evidence, and tended to support the affirmation of defendants that they did not know the nature or consequences of their act. The fact that they expected to remain and see the train push the ties off the track, and that each of them told their folks what they had done when they got home, is pretty conclusive that they did not realize that they had done wrong.

If any one of the defendants had not sufficient understanding to know that the act for which he was tried was wrong, such defendant cannot be convicted, and it was for the jury to determine whether or not the defendants, or either of them, lacked in capacity to commit the crime charged. The charge of the court improperly assumes that neither of the defendants was an idiot or imbecile.

The Attorney General and E. B. Larson, County Attorney, for the State.

The indictment states with sufficient certainty the fact that the piles of ties were placed upon the railroad track. It is difficult to see how any other meaning can be derived from the language than that the piles of ties were placed upon the railroad track. There could be no obstruction upon the track without its being placed thereon. The different piles were spread along the track within a distance of less than seven hundred feet, the seven hundred feet being a part of the track of the railroad company. No other reasonable construction can be drawn from the language of the indictment.

While admitting that the court committed an error in discharging the juror, it is not such an error as would entitle the defendants to a new trial. There should be something in the record showing, that on account of the court's discharging the juror, the defendants were prevented from obtaining a fair and impartial jury. Southern Pacific Co. v. Rauh, 49 Fed. Rep. 696; Thompson, Trials, § 120; Spies v. People, 122 Ill. 1.

The defendants admit placing the ties upon the railroad track, and offer no evidence whatever constituting a legal defense. There is no testimony in the record showing or tending to show that the defendants were insane or idiotic.

GILFILLAN, C. J. Defendants were indicted for placing obstructions upon a railroad track. They objected to any evidence being introduced, on the ground that the indictment does not state facts sufficient to constitute a public offense. The specific objection to the indictment is that it does not state with certainty that the obstructions were placed on the track. It states that the defendants did "willfully, wrongfully, maliciously, and feloniously place an obstruction, to wit, five piles of large, heavy, oak, railway cross-ties, all of which piles being within a distance of seven hundred feet upon the track of a certain railway," etc. The want of a comma after the word "feet" confuses somewhat the meaning of the sentence. Punctuation, though frequently of use in determining the meaning of sentences, is not, nor is its absence, always controlling. Courts frequently disregard it, and sometimes supply it, especially where it is necessary in order to give a meaning to the words. this instance, the words "place an obstruction" must be held to refer to the words "upon the track," etc., else the sentence begun is not completed, and the words really have no meaning. But they have a clear meaning if we supply a comma at the point suggested. While its absence may make a more careful reading necessary to get at the meaning, we do not see how any one could be misled, or could arrive at any other meaning than that the defendants placed the ties upon the track.

Whether the facts stated by the juror Aamodt, on being challenged, made a case of implied bias, within the statute, or not, his rejection could not, so far as the record shows, have prejudiced the defendants. They had no right to any particular juror being selected, provided they had an impartial jury to try their case, and, nothing appearing to the contrary, it is to be presumed that the jury was impartial. See Thomp. Trials, § 120, and cases cited.

Each of the defendants, when sworn in his own behalf, admitted doing the acts constituting the offense, so that the jury could not, (without violating their oaths,) do else than convict.

Two of the defendants were each fifteen years old, and the other sixteen years old, so that they were presumed, under the Penal y.57m.—35

Code, (sections 15-17,) to be responsible for their acts. There was no attempt to remove the presumption by proof of less mental capacity than boys of their age ordinarily have, or that they had not sufficient capacity to understand what they did, or to know its wrong fulness. Their own testimony that they did not know it was wrong to put the ties on the track, and did not know that the ties might throw the train off the track, and injure the passengers, did not, in the absence of any evidence upon the question of their general mental capacity, raise any issue as to their responsibility for their acts, for the jury to pass on. It did not tend to prove either of them to have been an idiot, imbecile, lunatic, or insane person, or that he was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or not to know that the act was wrong. Pen. Code, § 19.

There was no error, therefore, in the charge of the court, or in its refusals to charge.

The case will be remanded to the court below for further proceedings.

Vanderburgh, J., took no part in the decision. (Opinion published 55 N. W. Rep. 741.)

JOHN HART et al. vs. Julius Kessler.

Submitted on briefs June 20, 1893. Affirmed June 27, 1893.

Statute of Frauds.

Evidence held insufficient to show a sale in prassenti of personal property.

Appeal by plaintiffs, John Hart, Dennis A. Murphy and Charles F. Whaley, from an order of the Municipal Court of the City of St. Paul, H. W. Cory, J., made January 28, 1893, denying their motion for a new trial.

Michael R. Curry was the keeper of the Richelieu Hotel in West Superior, Wis., and purchased of the plaintiffs, at St. Paul, 5,000 cigars, worth \$300, and they were shipped to him, and he received

and stored them in the basement of the hotel. On July 20, 1891, Murphy, one of the plaintiffs, called at the hotel to obtain payment for the cigars. Curry could not pay, but agreed to turn over the cigars in settlement of the claim. He and Murphy went down into the basement, and saw the shipping box unopened. It weighed about 200 pounds. Curry pointed it out to Murphy, and told him the cigars were his; that he could take them in payment of the claim if he would give him a receipt in full. This Murphy told him he would do, and went away. A day or two after this Curry sold all his stores in the basement to the defendant, Julius Kessler, in payment of a debt he owed him. There was some dispute whether this sale to Kessler did, or did not, include these cigars. Kessler sold to Mrs. Hammond, and she soon after removed the cigars. Plaintiffs then demanded the cigars of Kessler, and brought this action to recover of him \$300, their value. The issues were tried without a jury. These facts appeared on the trial from the evidence introduced by plaintiffs. When they rested, defendant moved the court to dismiss the action on the ground that plaintiffs had not shown that they had title to the cigars. The defendant offered no evidence, and the court took the case under consideration until the next day, and then announced that the motion to dismiss was granted. The plaintiffs then asked permission to open the case and submit further evidence. The court refused the request, and plaintiffs excepted. They moved for a new trial, and being denied, appeal.

McLaughlin & Morrison, for appellants.

The court erred in refusing to open the case and allow plaintiffs to recall the witness and prove that the cigars were inclosed in a box upon which the name of Hart, Murphy & Whaley was marked, and that it weighed about 200 pounds, and prove that Curry said the cigars might remain where they were until Murphy could remove them.

This was an agreement to rescind the sale, and does not come within the statute of frauds. The court below evidently thought the right of the plaintiffs rested upon a simple contract of sale by Curry to them, which came within the statute. It was in fact a rescission of a sale, and not within the statute of frauds. Shaul v. Harrington.

54 Ark. 305; Gleason v. Drew, 9 Me. 81; Folsom v. Cornell, 150 Mass. 115; Salte v. Field, 5 Durnf. & E. 211.

The goods being in the same condition as when they left the vendors, Curry's pointing them out to plaintiffs, with permission to take them, amounted to a constructive redelivery. Jewett v. Warren, 12 Mass. 300; Hayden v. Demets, 53 N. Y. 426; Parsons v. Dickinson, 11 Pick. 352.

Williams & Schoonmaker, for respondent.

This is not a case of rescission of contract, but of conditional sale; the consideration was the cancellation of the debt for the purchase price. The plaintiffs must recover, if at all, on the strength of their own title or right, and not upon the weakness of that of defendant; or in other words, the plaintiffs must make out a case showing title in themselves. There was no delivery, actual or constructive, from Curry to plaintiffs. The property was in possession of Curry when he had this conversation with Murphy, and nothing was done by either to change the possession. Lathrop v. Clayton, 45 Minn. 124.

In cases of rescission the same formalities must be observed in respect to delivery, in order to revest the title in the original vendor, as are necessary upon an original sale in order to vest the title in the vendee. Folsom v. Cornell, 150 Mass. 115; State v. Intoxicating Liquors, 61 Me. 520.

GILFILLAN, C. J. The action being for conversion, the plaintiffs could not recover unless they proved their right of property in the chattels alleged to have been converted. The evidence introduced by them did not tend to prove this. They having sold the chattels (5,000 cigars, worth \$300) to Curry, the most that could be claimed for the evidence was that he orally agreed to retransfer them to plaintiffs, and they agreed to take them in payment of their account against him. Nothing was done that could be construed to be a delivery or a payment for them, and nothing said indicating that the parties understood it to be a completed retransfer of the property, or anything but an executory agreement to retransfer.

The fact that Curry excepted the cigars from his bill of sale to defendant had no tendency to prove a sale in praceenti to plaintiffs.

It was not abuse of discretion to refuse, the day after the proofs were closed, to reopen the case for plaintiffs to make further proofs.

Order affirmed.

(Opinion published 55 N. W. Rep. 742.)

JAMES MORIARTY vs. Home Insurance Co.

Argued June 21, 1893. Reversed June 27, 1893.

Insurance Policy Construed.

Under the conditions in a policy of insurance that "if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, without notice to and consent of this company in writing, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the consent of this company indorsed hereon," the policy shall be void, the words "by any means whatever," etc., do not qualify the words "or become vacant or unoccupied."

Appeal by defendant, Home Insurance Company of New York, from an order of the District Court of Ramsey County, *Hascal R. Brill*, J., made February 15, 1893, denying its motion for a new trial after verdict for plaintiff, James Moriarty, for \$521.85.

- S. E. Hall, for appellant.
- J. C. Mangan and O. H. O'Neill, for respondent.

GILFILLAN, C. J. Plaintiff was insured by defendant's policy upon a certain dwelling house. The policy contained, among other conditions: "If the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, without notice to and consent of this company in writing, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the consent of this company indorsed hereon, * * then, and in every such case, this policy shall be void."

The dwelling having become vacant, by a tenant leaving without notice, before the fire, the court below charged the jury that, if it became vacant by means not within his control, then plaintiff could recover.

It raises the question whether the words "by any means whatever within the control of the assured" qualify the words "or become vacant or unoccupied."

It requires a very forced and unnatural construction to give the words that effect,—a construction which would not occur to any one reading the policy for the purpose of determining whether he would accept it. The part of the policy quoted specifies several cases or conditions, each following a disjunctive to show that it is a condition by itself. They are divided into two groups, each followed by words qualifying each case in the group. In the first group are the case of increase of risk by the manner of use or occupation, and the case of becoming vacant or unoccupied, and the qualifying words applicable to those cases are "without notice to and consent of this company in writing," those words completing the condition. In the second group are increase of risk first by the erection or occupation of neighboring buildings; second, by any means whatever within the control of the assured. Then follow the words qualifying the cases in this group,—"without the assent of this company indorsed hereon." It would be a forced and unnatural reading to jump the words "or by any means whatever," etc., over the words "without notice," etc., following the first group, and read them into each case in that group, and, if that could be done, in order to make sense it would be necessary to leave out a word. Try it thus: "Become vacant or unoccupied, or by any means whatever within the control of the assured." Strike out the word "or" before the word "by," there is some meaning, but leave that word in, and there is no sense to the words following it.

A very slight change in the phraseology of conditions of this character in policies will materially change the meaning, and for this reason we get no aid from any of the decisions to which we are referred, for in no one of them were the words precisely as in this case.

Of course, such a condition is not to be understood as avoiding the policy the moment the premises became vacant. The assured must have a reasonable time within which to comply with the condition

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by giving the notice. Whether more than a reasonable time elapsed was not made a question in the case.

Order reversed.

(Opinion published 55 N. W. Rep. 740.)

LUCIUS E. WATSON vs. MINNEAPOLIS STREET-RAILWAY Co.

Argued June 2, 1893. Affirmed June 27, 1898.

Opinion, Witness Qualified to Give.

One who had been a conductor of an electric street car for two months held competent to testify within what distance such a car, going at a specified rate of speed, can be stopped.

Evidence Sufficient to Submit to Jury.

Evidence held to make a case for the jury on the questions of both defendant's and plaintiff's negligence.

Jury Sent Back for Further Deliberation.

When a jury report they cannot agree, it is in the discretion of the court to send them out for further deliberation.

Jury may be Urged by the Judge to Agree.

In such case it is proper for the court to urge them to use all reasonable efforts to come to an agreement, and to state, as a reason for it, that the case is an expensive one to try.

Care Required of Street Railway at Crossings.

At a street crossing as high a degree of care is required of those in charge of an electric street car as of those driving other vehicles.

Charge to the Jury Stating Facts Proved.

Where the fact to be found is to be determined upon the consideration of numerous facts and circumstances proved, whether and to what extent the trial court, where it has fully, correctly, and clearly stated to the jury the general rules that are to control them in their deliberations on the facts, shall call their attention to particular facts and circumstances, is in its discretion.

Street Railway has No Priority of Way at Crossings.

A street-railway car has no priority of way at a street crossing, with respect to other vehicles, and when the driver of such another vehicle, approaching the street-railway track to cross it, sees a car approaching at

such a distance that he can apparently make the crossing safely, he has a right to attempt it, and it is not negligence per ss in him to attempt it without looking a second time at the car.

Negligence of Electric Railway at Crossings.

Upon much-traveled streets in a city it is negligence to run an electric street-railway car over a crossing at a high and dangerous rate of speed; and it is also negligence to run it over a crossing, the person in charge of it not being on the lookout, nor having the car under control, nor using the proper means to stop it, so as to avoid a collision.

Damages.

Damages held not excessive.

Appeal by defendant, Minneapolis Street-Railway Company, from an order of the District Court of Hennepin County, *Thomas Canty*, J., made November 19, 1892, denying its motion for a new trial.

On April 23, 1892, the plaintiff, Lucius E. Watson, was driving east on Eleventh Avenue across the defendant's railway tracks on Washington Avenue, South. He had four horses and a heavy load of lumber, about 4,000 feet, which he was delivering for a lumber company. An electric interurban street car coming from the south struck his load before he could get it across and clear of the track, and he was thrown off and injured. He brought this action to recover damages, claiming the collision was due to the negligence of the motorman. That he ran the car at the rate of over twelve miles an hour, and allowed his attention to be diverted by something on the east side of the street, so that he failed to look ahead and see plaintiff and his load. The answer was a general denial. The evidence was conflicting as to the rate of speed of the car, and whether or not the motoneer saw plaintiff, or struck his gong, or applied the brake, or turned off the current.

In the charge to the jury the Judge said: "The question for you to determine is, who is to blame? If both parties are to blame, or if neither party is to blame, or if plaintiff only is to blame, he cannot recover. The law does not require that he shall look and listen in all cases before crossing a street-car track. You must decide from all the circumstances in the case how much vigilance and care a man of ordinary prudence should use, in crossing or in looking and listening before he crosses, and in continuing to look and listen as he crosses, these street-car tracks under the circum-

stances. A man with a heavy load and four heavy horses should use more care and vigilance than a man driving a shorter team and a lighter vehicle. If you find plaintiff was not to blame, that he used a reasonable and ordinary amount of care and vigilance in looking for cars, such as he should have used under the circumstances, then you must determine whether or not the defendant was to blame, through its driver. It is the duty of the defendant also to use reasonable care, to see that it does not injure persons, passing over its tracks; it is the defendant's duty to use reasonable care to give warning of its approaching cars when it sees persons about to cross or approaching the crossings of its street-car track, or where they are likely to cross. It is the defendant's duty to keep its cars under reasonable control at such times; and it is its duty to run at a reasonable rate of speed through the crowded streets where there is a great deal of public travel. You must decide whether the driver of this car did give reasonable warning, when he saw this man about to approach this crossing, or about to cross these tracks; whether he used reasonable care in keeping his car under his control at that time; whether he was running at an improper or dangerous rate of speed. A great many accidents and injuries occur in this world where nobody is to blame, and the fact that the street car struck this man is no reason why he should recover from the company, unless it was the fault of the defendant company, and not his fault."

The jury retired and were out all night. The next morning they came into court and reported that they could not agree. The judge sent them out again, saying: "It is your duty, gentlemen, to use all reasonable efforts to come to an agreement in this case. We have taken three days to try it. The fact that it is a difficult case is no reason why you should not use every honest effort to come to an agreement, because the next jury will have to do the same thing; and if you don't agree, the next one will have to try it. It makes expense to the county and to the parties. It is your duty to use every honest and reasonable consideration in attempting to come to an honest and fair agreement."

The jury retired, and soon after returned into court, and rendered a verdict for plaintiff, and assessed his damages as \$6,000. The defendant made, settled and filed a case, containing all the evidence

and the charge to the jury, and its requests to charge, and its various exceptions to the rulings, and moved the court to set aside the verdict and grant a new trial. This application was denied, and it appeals.

Some of the assignments of error mentioned in the opinion were as follows:

"Third. The District Court erred in denying the motion of appellant to direct a verdict for the defendant.

"Fourth. The District Court erred in holding that the evidence given on the trial sustained the negligence alleged in the complaint.

"Fifth. The District Court erred in holding that the evidence given on the trial did not show contributory negligence on the part of the plaintiff.

"Eighteenth. The District Court erred in denying the defendant's motion for a new trial.

"Nineteenth. The District Court erred in holding that the verdict of the jury was not contrary to law.

"Twentieth. The District Court erred in holding that the verdict of the jury was justified by the evidence.

"Twenty-first. The District Court erred in holding that the verdict of the jury was justified by the evidence, and the weight thereof.

"Twenty-second. The District Court erred in holding that the evidence did not show contributory negligence on the part of the plaintiff.

"Twenty-sixth. The verdict of the jury is not justified by the evidence.

"Twenty-seventh. The verdict of the jury is against the evidence and the weight thereof."

Koon, Whelan & Bennett, for appellant.

It may not be well to apply the rigid rule that one driving across a street-railway track must stop, look and listen, as when crossing the tracks of a steam railway. In these times, when electricity, as a motive power, has taken the place of the horse, and rapid transit is demanded by the public and required by the city ordinances, a teamster, about to drive a four-horse team, thirty-eight feet long, and hauling a load weighing six tons, across a street railway track,

should use his senses, and at least look for its approach when there was nothing to hinder his looking. This rule ought to be applied by the court and made universal, instead of being left to a jury as their honesty, intelligence, prejudice or ignorance may dictate. Carson v. Federal St. & P. V. P. Ry. Co., 147 Pa. St. 219; Ehrisman v. East Harrisburg C. P. Ry. Co., 150 Pa. St. 180; Wheelahan v. Philadelphia Traction Co., 150 Pa. St. 187; Thomas v. Citizens' Pass. Ry. Co., 132 Pa. St. 504; Ward v. Rochester Electric Ry. Co., 17 N. Y. Supp. 427; Wood v. Detroit City St. Ry. Co., 52 Mich. 402; Chicago West Div. Ry. Co. v. Bert, 69 Ill. 388.

The respondent was guilty of contributory negligence, which caused or assisted in causing this accident. Before he drove upon Washington Avenue, he saw this car approaching, and knew that it was about to pass over the very point towards which he was direct-And yet, without excuse of any kind, he urged his long, slow-moving team, with its heavy load, directly into the path of the car; driving, in so doing, between sixty and seventy feet, at the rate of about two miles per hour, without either looking or listening, when, by doing either, he could have discovered the approach of the car. There can be no reasonable inference drawn from such conduct other than that of negligence on his part. The fact that he had full knowledge of the track and grade, and that the car was approaching near by, before he drove upon the track, distinguishes this case from that of Shea v. St. Paul City Ry. Co., 50 Minn. 395.

Merrick & Merrick and H. H. Merrick, for respondent.

It was the undoubted duty of the plaintiff to use ordinary care in attempting to avoid injury, and whether he did use such care was a question for the jury to decide. When his team reached Washington Avenue the car had not reached the crossing at Twelfth Avenue, a block away. The crossing was free and he not only had the right of way, but had the right to presume that the defendant, having a full view of his team, and knowing that he was crossing, would not run its car against him. A traveler upon the public street, where electric cars are run, is not required to exercise the same care and precaution that is required of persons driving across a railroad track. Shea v. St. Paul City Ry. Co., 50 Minn. 395.

There is very little law in the case. The questions are those of

negligence, and were for the jury under all the facts and circumstances surrounding the transaction. They found the defendant negligent, and that the accident or injury occurred through such negligence, and that plaintiff was not guilty of contributory negligence. These were questions purely of fact, to be determined by the jury from all the evidence in the case. Lynam v. Union Railway Co., 114 Mass. 83; Chicago City Ry. Co. v. Robinson, 127 Ill. 1; Adolph v. Central Park, N. & E. Riv. R. Co., 76 N. Y. 530.

The introduction of the electric car as a motor power upon our public streets and avenues, and the great frequency of accidents by reason of collisions with travelers and their vehicles, seem to call for a plain statement of the law as to the relative rights of these parties in the public streets.

GILFILLAN, C. J. The witness Walden showed himself competent to state within what distance an electric railway car going at the rate of fourteen miles per hour (at which rate some of the evidence indicated the car which injured plaintiff was going) can be stopped. He had been conductor on such a car two months, must have seen such cars stopped many hundreds of times, when going at as high a rate of speed as they ordinarily attain, and was at the time conductor on the car which did the injury. It must be presumed that he was an ordinarily observant man, and, if so, he must have been able to express a pretty accurate opinion on the point.

The evidence made a fair case for the jury, both as to the negligence of the defendant and the contributory negligence of the plaintiff; so that the 3d, 4th, and 5th assignments of error are not well taken. And it is the same with the 18th to the 22d, both inclusive, and the 26th and 27th.

Whether, when a jury comes into court, and reports that it cannot agree, it shall thereupon be discharged, or shall be again sent out to deliberate further upon the case, is in the discretion of the trial court; and, before this court could order a new trial because of the jury having been sent out again, clear abuse of discretion, resulting in prejudice to the party complaining, would have to appear. Nothing of the kind appears in this case.

There was no impropriety in the court urging upon the jury to use all reasonable efforts to come to an agreement, and stating, as a

reason why they should do so, that the case was an expensive one to try, both to the county and the parties.

The court below, in its general charge, in connection with some requests to charge, given and not excepted to, stated clearly and concisely the rules of law applicable to the respective rights of the parties upon the street, and the duty of each in respect to care in making the crossing, and the matter of negligence or absence of negligence on the part of either or both the parties. The only objection to the general charge, insisted upon in appellant's brief, is to a part where the court, after stating the degree of care required of each of the parties, said: "If two teams collide in the street, you must determine by the same rules whether they were using reasonable care towards each other, and, if not, who is to blame." The only suggestion in the brief, of error in this, is that there is a difference between an electric car, running on a fixed track, and a team able to turn to the right or left. That is an important consideration when at the time of the collision the car and other vehicle are passing along the same streets, and the question is which ought to have made way for the other. But the collision in this case was at a crossing, and there is no question which ought to have turned to the right or left to let the other pass. quiring of those in charge of an electric car at a street crossing the same degree of care as is required of the drivers of other vehicles is not stronger than was laid down in Shea v. St. Paul City Ry. Co., 50 Minn. 395, (52 N. W. Rep. 902,) where it was said: no modification or exception that relieves a street-railway company from exercising at least as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars." So that the degree of care required of a street-railway company at a crossing, by the clause quoted from the charge, to wit, that required of the driver of any other vehicle, was not overstated.

There were numerous requests to charge, some of them very long. Those on the part of the appellant take up over five pages of the paper book. There is a growing tendency—not to be encouraged, we think—on the part of attorneys trying causes, especially those where the fact to be found (such, for instance, as negligence) is to be determined upon the consideration of numerous facts and cir-

cumstances proved, to make long requests, instructing the jury what effect they are to give to one or more of such facts and circumstances in arriving at a conclusion on the principal question. It is frequently, perhaps generally, unsafe to give such requests, as it may induce the jury to consider unduly the facts and circumstances specified, and leave out of account others that may be entitled to materially modify their effect. Several of appellant's requests, which the court refused, were of this character. tration of it is afforded by its ninth request, which was, in substance. that if, when plaintiff first came along Eleventh, to cross Washington, he saw the car approaching, and knew it would cross the path along which he was moving, and he drove his team along such path, and did not again look until such interval had elapsed that the car was too near to avoid collision, and if, during such interval, had he looked, he could have avoided the collision, he was guilty of negligence.

This leaves out very important circumstances, which, on the question of his negligence, the jury were to consider: First, the distance the car was from him when he saw it; second, at what rate of speed he had a right to suppose it was approaching. Suppose, when he saw it, the car was so far away that if it came at the usual rate of speed he could have easily passed before the car reached the crossing. Certainly, in such case, it would not be negligence per se, as the request assumes, to cross without looking a second time. The fourteenth request has precisely the same fault.

When the court, in its general charge, states fully, correctly, and clearly the general rules that are to control the jury in their deliberations on the facts, whether it will call their attention, and, if so, to what extent it will call their attention, to particular facts and circumstances tending to establish the principal fact, such as negligence, is in the sound discretion of the court. It will not be error to decline to do it at all, though, if it do it in such a way as to mislead the jury, it will be error. Of course, where the fact proved is conclusive upon the fact to be found, as proof of an attempt to cross a steam railway without looking or listening, when there is nothing to prevent the party looking or listening, and by doing so he can avoid the danger, is conclusive of his negligence, the court must so instruct the jury.

The appellant's 11th, 12th, and 13th requests were merely the application, to particular facts and circumstances specified, of the rules which the court had, in its general charge or in requests given, stated to the jury, and it was proper to leave it to them to make the application.

The giving of plaintiff's fourth request is assigned as error. request comes, at least, very near to being obnoxious to the criticism we have made upon several requests on the part of the defendant, and it is necessary to consider if it could have misled the jury. may be divided into two parts,—the first relating to the question of plaintiff's negligence; and the second, to that of defendant's negligence. The first part is the proposition that if, when plaintiff was about to cross, the car was not on that portion of the street over which he attempted to cross, and was not threateningly near or threateningly approaching the same, or if there was nothing to warn the plaintiff of its approach, or of the rate of speed at which it was approaching, he might lawfully drive across said track. The objection to this part of the request is that it ignores the conceded fact in the case,—that he saw the car as he approached the crossing, from which it is claimed that warning of the car's approach was unimportant. As he was about to cross he saw the car just coming off of Twelfth avenue, nearly a block away from him, and there was no evidence that he saw it again till he was already on the track, and it was too late for him to avoid a collision. quest is to be understood, and the jury must have understood it, with reference to that situation. If he had no other notice of its approach than having seen it a block away, and no warning that it was approaching at such a rate of speed that he could not safely attempt to cross, he had a right to do so, unless he was bound, seeing it at that distance, to stop till it passed. But, as held in the Shea Case, a car on a street railway has not, as, from the necessity of the case, has a train on an ordinary steam railway, a priority of way at the crossing. Of course it would be negligence to attempt it when one had reason to believe that the car cannot be controlled or checked so as to avoid a collision before he gets across. the uncontradicted evidence in the case as to the distance within which the car could be stopped, one seeing it nearly a block away, as he was about to go upon the crossing, would not have any reason

to suppose it dangerous. There was no error in that part of the request. After what we have stated above from the request, it continued: "And if, in the exercise of ordinary care, as a prudent person, in so doing, he was injured through the negligence of the defendant in." Then follows the specification of acts or neglects which the court, in effect, charged would be negligence. The first of these, to which attention is called by appellant's brief, is: said car was running at a high and dangerous rate of speed." There can be no question that, upon much-traveled streets in a city, that would be negligent. The second is: If the person in charge "was not then on the lookout, and did not then have his car under control; did not use the proper means or necessary means to stop said car, and avoid such collision." What is thus indicated as the duty of one in charge of such a car is not higher than would be required of an ordinarily prudent person in propelling through the thronged streets of a city so dangerous a vehicle as an electric car. The neglect of that duty would be negligence.

The damages allowed were large, but, in view of the injuries sustained by plaintiff,—severe, lasting, and liable to terminate fatally,—we do not consider them excessive.

Order affirmed.

(Opinion published 55 N. W. Rep. 742.)

ZOE ROUSSAIN et al. vs. JAMES W. NORTON et al.

Argued June 14, 1893. Affirmed June 27, 1893.

Venue to a Certificate of Acknowledgment of Execution of Instrument.

Where an officer has authority to take acknowledgments anywhere in the state, the addition, in the venue to the certificate, of a wrong county, or where there is no such county, will not affect its validity.

Effect of Record of Deed not Impaired by the Time of the Acknowledgment.

Where a deed and the acknowledgment are regular on their face, it will not impair the effect of the record that the acknowledgment was in fact taken before the deed was complete, as where the name of the grantee, or description of the premises, had not been inserted.

Name on Tax List not Notice of Adverse Claim.

One purchasing real estate from one appearing to be the owner, by the records in the register's office, is not chargeable with notice that it is assessed for taxation to another person.

Evidence of Value.

On the question of the market or selling value of the land, the opinion of a geological expert, not published or known so as to affect people's estimate of the value, that there is valuable stone beneath the surface, is not admissible.

Possession as Notice of Unrecorded Title.

Possession of land, in order to be notice of the possessor's rights to one who buys from the apparent record owner, must be a present possession. A former possession, which has ceased, though there be still evidence of it on the land, will not suffice. And where the possession is not shown by residence on the land it must be shown by acts of dominion over it, such as indicate, not mere casual entries, but a continued claim of right.

Findings Supported by the Evidence.

Certain findings of fact held justified by the evidence.

Graves and Gravestones as Notice of Occupation.

And certain facts and appearances on the land, including the presence of graves,—some with gravestones bearing the names of those buried,—considered, and held not to be indicative of the present continued exercise of dominion over the land, so as to be notice to a purchaser from the record owner that some other person claims it.

Appeal by plaintiffs, Zoe Roussain and Francois Roussain, Jr., from an order of the District Court of St. Louis County, D. B. Searle, J., made December 24, 1892, denying their motion for a new trial.

The plaintiffs are the heirs at law of Francois Roussain, Sr., who died intestate June 3, 1885, seised in fee of the northwest quarter of section six, (6,) T. 48, R. 15, in St. Louis County. He received patents for the land in 1860. He and wife deeded it in 1867, to D. Geo. Morrison of Superior, Wis., as security for money borrowed. In 1872, Morrison and wife reconveyed the land to Francois Roussain, Sr., but the deed was not recorded until March 26, 1890. Meantime Morrison and wife had deeded the land to John P. Johnson, and he and wife to Persis T. Norton and John F. Patten, under the circumstances stated in the opinion. Patten afterwards sold and conveyed his interest to Charles E. Dickerman and Sumner W. Matteson. v.53m.—36

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They conveyed to E. L. Emery, and he gave them a mortgage on the land for a part of the purchase price.

When Johnson purchased the land, its value was triffing. Shortly after, it acquired a speculative value, owing to the discovery of brown sandstone, and to rumors that the Dalles of the St. Louis were to be improved and utilized for manufacturing purposes. When Norton and Patten purchased, there were about thirty graves on the southeast corner of the land, some of them very old, some provided with gravestones with inscriptions on them.

The defendants in this action were Persis T. Norton and James W. Norton, her husband, E. L. Emery, Charles E. Dickerman, and Sumner W. Matteson. The object of the action was to establish the plaintiffs' title, and obtain a decree that the defendants were not purchasers in good faith, but were chargeable with notice and knowledge, sufficient to put them upon inquiry, as to the rights of Francois Roussain, Sr., and his heirs. A former appeal is reported. 46 Minn. 308.

H. S. Lord, M. B. Webber, and John H. Norton, for appellants.

White, Reynolds & Schmidt and Warner, Richardson & Lawrence, for respondents.

GILFILIAN, C. J. This is an action under the statute to determine adverse claims to real estate, brought by the widow and heirs of Francois Roussain, Sr., deceased.

In 1860 the land in controversy, consisting of one tract of 168 acres, was conveyed to him by United States patents duly recorded in the register's office in the county (St. Louis) in 1863. January 10, 1867, he, by deed absolute in form, but intended as security, and so a mortgage, and duly recorded January 14, 1867, conveyed the land, in terms, to one Morrison. April 15, 1872, Morrison reconveyed the land to Roussain by deed not recorded till March 26, 1890. So that from January 14, 1867, till the conveyance to Johnson, hereafter mentioned, Morrison appeared by the record to be the absolute owner. Roussain died in June, 1885.

In January, 1887, Morrison, by deed (the peculiarities in the execution and acknowledgment of which will be hereafter referred to) duly recorded January 28, 1887, conveyed the land to one Johnson, subject to taxes, and a certain tax sale. The consideration expressed

in the deed was \$200, and the amount required to redeem from the tax sale, and pay off the taxes then on the land, was \$181.49.

The court below finds, as facts, that Johnson purchased in good faith, and without notice or knowledge of the unrecorded deed of April 15, 1872, or that the deed of January 10, 1867, was intended to operate otherwise than according to its terms, or that after January 10, 1867, Roussain or the plaintiffs had or claimed any interest in the land; and there are similar findings in respect to those who purchased from Johnson, and those who purchased from them. In respect to Johnson there is, in the evidence, strong suggestion to the contrary of the finding. But as a purchaser in good faith from a purchaser in bad faith will be protected, under the registry laws, it is immaterial whether the finding in respect to Johnson is sustained by the evidence, if it be sustained in respect to the purchaser from him.

February 17, 1887, Johnson conveyed to Norton and Patten by deed duly recorded March 9, 1887, and the other defendants claim through those grantees.

The circumstances referred to in respect to the execution and acknowledgment of Morrison's deed to Johnson were that Morrison filled a blank form of deed, leaving, however, blanks for the grantee's name, and the description of the property; and in that condition he and his wife signed and sealed it in the presence of two subscribing witnesses, and then, at Superior, in the state of Wisconsin, acknowledged the same before a notary public of that state. The venue to the notary's certificate was, "State of Wisconsin, county of St. Louis -ss.," there being then no such county in Wisconsin. ing to the statute in that state, as construed by a decision of the supreme court,-both being properly proved as facts,-a notary public in that state may take an acknowledgment anywhere within the The purpose of the venue to an official certificate is to show that the official act is done within the territorial jurisdiction of the officer. Any more in the venue than is necessary for that purpose is surplusage, and may be disregarded. This notary's jurisdiction extending over the whole state, the name of the state was all that was necessary in the venue. The addition of surplusage, whether untrue or not, did not affect it. Morrison then took the deed, with said blanks in it, to Duluth, where Johnson filled the blanks, and it was then delivered by Morrison to him. The deed was thus an effectual deed, as to Morrison. The acknowledgment was improperly taken, because, when taken, the instrument was, by reason of the blanks, of no force. That, however, did not affect the record of it. When an acknowledgment appears to have been taken, within his jurisdiction, by the proper officer, and there is nothing on the face of the deed or certificate of acknowledgment showing either to be void, the record will have the same effect as if both are entirely regular; that is, no extrinsic fact will impair the record. Claque v. Washburn, 42 Minn. 371. (44 N. W. Rep. 130;) Bank of Benson v. Hove, 45 Minn. 40, (47 N. W. Rep. 449.)

Morrison and his wife would, under the decision in *Pence* v. Arbuckle, 22 Minn. 417, be estopped, in favor of bona fide purchasers from Johnson, to allege that either the deed or the acknowledgment, by reason of its having been prematurely taken, was invalid; and if the grantor's record title pass by his deed it does not matter, either as to him or any one else, how its execution is established,—whether by estoppel, or by actual proof of the facts constituting a proper execution. To show that Morrison's record title passed by his deed it was proper, as against any one claiming that title, to prove its execution by such facts as would estop Morrison to deny it.

There was nothing on the face of the record to put any purchaser from Johnson upon inquiry, beyond the record, as to his title. The erroneous insertion in the venue to the notary's certificate of the words, "County of St. Louis," would not suggest a doubt as to Morrison's title, nor anything except that the notary inserted them through inadvertence.

The fact that notwithstanding the title appeared, by the records in the register's office, to be in Morrison, the lands were assessed for taxation in the name of Roussain as owner, and that he paid the taxes for one of the years, (1881,) was not constructive notice to a proposed purchaser of the Morrison record title that Roussain had any interest in the land. The books in the county auditor's office are not kept for a record of titles to real estate, and no one examining titles, or proposing to purchase, is required or expected to examine them to ascertain who is the owner, nor who has paid the taxes, nor for any purpose except that of which they are evidence, to wit, that there are or are not at the time taxes due on the land.

Norton and Patten having testified—and that evidence was proper—that they had no actual notice that at the time of their purchase any one but Johnson made any claim to the land, and the court having so found, there being no evidence to the contrary on that point, the plaintiffs' case must rest on constructive notice to those purchasers; and the question of constructive notice is brought down to the one whether the plaintiffs were in possession, so that the law made it the duty of purchasers from Johnson to know of such possession, and, in the exercise of good faith, to inquire as to the right under which such possession was had.

But before taking up the question of possession we will refer to a claim of appellants, that the consideration stated in the deed from Morrison to Johnson was suggestive of some defects in the former's title, so as to make it the duty of the purchasers from Johnson to inquire beyond what the record showed as to the title of the former. The purchase by Norton and Patten followed so closely in time upon the conveyance by Morrison to Johnson that it may be assumed they knew the value of the land at the time of that conveyance; and, if the consideration were so grossly disproportionate to the value as to suggest that the inadequacy of consideration was because there was something wrong with the title, good faith might have required of the purchasers from Johnson to inquire what, if any, were the defects in Morrison's title. But the court below found, in effect, that the consideration was not disproportionate to their value, and that finding is justified by the evidence. And, as to the evidence of value, the opinion of a geological expert, not published or known so as to enter into people's estimate of value, that there was brownstone under the surface, could not be supposed to affect the market or selling value of the land, and the court below properly excluded such an opinion.

On the question of good faith on the part of Norton and Patten, it is of no consequence that prior to making their purchase they did not go to the land, unless by going they could have ascertained that some one was in possession. To charge a purchaser with notice of the rights of others than his grantor by the mere fact of possession, the possession must be a present one. A former possession, which has ceased, will not suffice, although there be evidence of its having existed still apparent on the land. The question in such case is

not what was the condition as to possession, or the indication of possession, years before, but what was such condition and indication at the time of the purchase or during the negotiations ending in it. In this case there was no one resident on the land. Nor is that necessary where, in lieu thereof, the party claiming an interest in the land is exercising acts of dominion over it, such as leaves on the land indications of not mere casual entries, but a continued claim of right to it. The facts found by the court below as to the possession—and the evidence sustains the finding—are stated as follows:

"(22) That there then were grouped together upon a small patch of said land, near the southeast corner thereof, about thirty graves, some of which were very old, and others less so, and some of said graves were provided with gravestones, with inscriptions on them indicating that some of the persons buried there had borne the name of Roussain, and others the name of Durfee, and most of them other names, and one of them indicated that the body of said Francois Roussain, Sr., had been, as it was, buried there. Said patch of land was unfenced, but some of said graves were separately inclosed.

"(23) Said land then had the general appearance of having been once partially improved, (as it had been by said Francois Roussain at or about the dates of said patents,) and then permanently abandoned a great many years anterior to A. D. 1887.

"There was then an old clearing in the timber on said land, of about four acres in extent, through which clearing extended an old, unfenced, and abandoned road, which in former days had been the road from said village of Fond du Lac to Thomson. Said clearing was then largely grown up with brush, and here and there between the clumps of brush was sod, on which grew tame grass. Near the south side of said old road, within said clearing, there were the remains of a few fruit trees, the bodies of which were dead and broken down, with sprouts from the roots; and, about the spot where these trees were, there then were the remains of what once had been a pole fence, which then was rotten and broken down.

"Said graves were not within said clearing, but near the side of said road, and a little east of said clearing, in an opening in said timber near the southeasterly corner of said land.

"There was not then, and had not been for more than twenty years, any building on said land; but there was once a house thereon,

which had been burned,—just when, did not appear in the evidence. "Said land was then uninclosed, and there was nothing to indicate that it ever had been fenced in any manner, and in point of fact it never had been fenced or inclosed in any way. Said land was located in what had been a heavily-timbered region, covered with dense undergrowth."

In this recital of facts everything indicates that there was no present possession, no continued exercise of acts of dominion over the land,-such, for instance, as annual cultivation, or a use of it for a wood lot, or any such purpose. In considering the question of continuing exercise of dominion indicating a present claim, the mind could pause on none of these facts, unless those relating to the presence of the graves. That one may make a continued assertion of right to a tract of land, so as to put a purchaser from another upon inquiry as to his right, by devoting a part of it to, and maintaining it as, a private burial ground for his family, relatives, and friends, must be conceded. It is true the dead are incapable of possessing the land. It is the act of the living in burying their dead on the land which constitutes exercise of dominion over, and the assertion of claim of right to, it. But according to the fact, as found, these graves did not present the appearance of the spot being maintained as a private or family burial ground by any person, so as to indicate the exercise of exclusive dominion over the land by any one. On the contrary, the number of the graves, the gravestones,-some bearing the name of Roussain, others of Durfee, and most of them other names,-suggest only that this secluded spot in the wilderness was used for burying their dead, generally and in common, by the people of the sparsely-settled neighborhood. The conclusion from the number of, and names over, the graves, that it was a common, and not an exclusive or private, burial ground, would be strengthened by the neglected and abandoned appearance of the entire tract; that the spot was not inclosed, and, so far as found, or the evidence shows, was not cared for by any one.

It is impossible to hold that under the circumstances the presence and appearance of those graves was notice of plaintiffs' right to a purchaser of the record title.

Of the claim that the Roussain possession ripened into title by adverse possession, as against the apparent record title, while we

do not see how such a title could deprive a purchaser of such record title, without notice of the title by adverse possession, of the protection afforded by the registry laws, it is enough to say that the facts as to the character and time of possession by Roussain and the plaintiffs do not show title by adverse possession.

It would be both tedious and unprofitable to allude in detail to the many assignments of error. All that deserve attention are, in general terms, covered by this opinion.

Order and judgment affirmed.

(Opinion published 55 N. W. Rep. 747.)

Motion for new trial denied July 11, 1893.

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ACCIDENT INSURANCE. See INSURANCE, 470.

ACCOUNT BOOKS. See EVIDENCE, 360.

Entries in a merchant's account books are not conclusive against him on the question, to whom were the goods in fact sold. Culver v. Scott & Holston Lumber Co., 360.

ACKNOWLEDGMENT.

- An official certificate of acknowledgment of the execution of an indemnity bond, constitutes *prima facie* proof of its execution. *Romer* v. *Conter*, 171.
- Where an officer has authority to take acknowledgments anywhere in the State, the insertion of wrong county in the venue to the certificate, or of a county not in the State, will not affect its validity. *Roussain* v. *Norton*, 560.
- The record of a deed as notice, is not impaired by the fact that the deed itself was not complete when the acknowledgment of its execution was taken. *Id.*

ACTIONS. See Parties to Actions, 73, 407, 446.

An assignee of a part of a single claim or cause of action cannot maintain a several action to recover his part. Dean v. St. Paul & D. R. Co., 504.

ADMINISTRATORS.

An administrator presented a claim against the estate and it was allowed. Eight months thereafter one of the next of kin petitioned the Probate Court to open the allowance and permit him to defend. He made practically no excuse for his laches. An order opening the matter was reversed as an abuse of discretion. In re Kidder's Estate, 529.

ADVERSE POSSESSION.

The exclusive occupancy of land for fifteen years, by a railroad for station yard purposes, which had been previously dedicated for, but not used as, a street, was held, not adverse to the public so as to confer title by adverse possession. St. Paul & D. R. Co. v. Village of Hinckley, 398.

ADVERSE CLAIM.

A purchaser of real estate is not charged with notice of an adverse claim from the fact that it is taxed to another person. Roussain v. Norton, 560.

AGENCY.

Evidence that an agent of a street railway company was authorized to see that injured persons were taken where medical aid could be given them, construed to give the agent authority to employ medical aid. Hanscom v. Minneapolis Street-Railway Co., 119.

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AGENCY—Continued.

A servant in charge of his employer's live stock en route by rail from Redding, Ill., to Lakefield, Minn., is presumed to have authority to make reasonable and necessary contracts for its transportation over the different connecting lines of railway. Armstrong v. Chicago, M. & St. P. Ry. Co., 183.

The person through whom plaintiff obtained a policy of insurance was by the evidence, shown to be an insurance broker, but not shown to be an agent of the Insurance Company. Gude v. Exchange Fire Ins.

Co., 220.

If a private corporation retains and uses money borrowed for it by one of its officers, in excess of his authority, it thereby ratifies the transaction and is liable to the lender for the money. Willis v. St. Paul Sanitation Co., 370.

A bank taking a note for collection is the agent of the holder of the paper, and in case the note is not paid, it should protest and give notice thereof. Jagger v. National German-American Bank, 386.

ALIMONY. See Frauds, Statute of, 110.

ANSWER. See PLEADING.

An answer held defective in not stating a defense or counterclaim. Krause v. Thomas, 209.

APPEAL IN ELECTION CONTEST. See Elections, 290.

APPEAL FROM JUSTICE'S COURT.

A judgment of a Justice appealed to the District Court on questions of law alone can not be reversed merely because the Justice, having been requested to do so, has not returned all the evidence. Cour v. Cowdery, 51.

Upon an appeal from a Justice on questions of law alone, the District Court may, after a decision, reconsider and modify its first decision of

the case. Meister v. Russell, 54.

On such an appeal the District Court may modify the judgment, where the erroneous part is severable from the remainder. *Id*.

An appeal on questions of both law and fact is unauthorized where the damages recovered are but \$15, and do not exceed that sum. Wrolson v. Anderson, 508.

APPEAL TO SUPREME COURT.

An appeal from an order granting or refusing a new trial suspends the right to enter judgment in the trial court. St. Paul & D. R. Co. v. Village of Hinckley, 102.

An appellant who assigns as error the denial of his demand for a jury trial, should make it appear from the record that his demand was accompanied by payment into court of the jury fee. McGeagh v. Nordberg, 235.

The courts can not enlarge the time given by statute in which to appeal.

Burns v. Phinney, 431.

One having no interest in the subject in controversy can not be heard on

appeal. Id.

When it appears that the return to this court was not in fact made by the inferior court, or its officers, this court has no jurisdiction of the case and will strike the false return from its files. Paige v. Mille Lacs Lumber Co., 492.

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APPEARANCE.

An appearance for any other purpose than to question the jurisdiction of the court is a general appearance and gives the court jurisdiction of the defendant. St. Louis Car Co. v. Stillwater Street-Railway Co., 129.

ARBITRATION.

An agreement to submit certain matters to arbitrators under the statute is of no effect if the names of the arbitrators are omitted when it is acknowledged. Northwestern Guaranty Loan Co. v. Channell, 269.

ASSESSMENTS FOR LOCAL IMPROVEMENTS. See Eminent Domain, 318.

ASSESSORS.

The rule exempting judicial officers from civil actions for their decisions and acts in that capacity, however erroneous, and by whatever motive prompted, extends to assessors in assessing property for taxation. Stewart v. Case, 62.

ASSIGNMENT. See Insolvency.

An insolvent made a common law assignment as regulated by Laws 1876 ch. 44. He sought by action to reform the instrument so as to convert it into an assignment under Laws 1881, ch. 148, as amended. This was refused on the ground of his delay. Cottrell v. Citizens' Savings Bank, 201.

ASSIGNMENTS OF ERROR. See Frror, Assignments of, 551.

ATTACHMENT.

A writ of attachment issued by a Justice of the Peace need not state the town in which he holds his office, if it state the county and be otherwise correct. B seman v. Weber, 174.

A motion can not be made under 1878 G. S. ch. 66, § 160, as amended by Laws 1885, ch. 110, to vacate an attachment, after final judgment has been entered in the action. *McDonald* v. *Clark*, 230.

ATTORNEY AT LAW.

An agreement between attorney and client that for his services the attorney shall have one-half the recovery for a personal injury, is invalid. Such a claim is not assignable, nor can a lien be created upon it. Hammons v. Great Northern Ry Co., 249.

Service of a pleading or notice upon an absent attorney can not be made by leaving it in a conspicuous place in his office, if he has a clerk therein, or other person in charge thereof. *Mies* v. *Thompson*, 273.

The attorney for plaintiff failed to sign his name at the end of the copy summons served. It was written upon the back, and was signed to the copy complaint served with the summons. *Held*, a mere irregularity. Lee v. Clark, 315.

An attorney at law employed to foreclose a mortgage on real estate under the power of sale therein, has not, from that fact, authority to demand and receive from the sheriff the money paid to him to redeem from the foreclosure sale. In re Grundysen, 346.

BAILMENT.

The custody of personal property by a bailee is consistent with the title of the owner, and a purchaser from the bailee acquires no title. Hedderly v. Backus, 27.

BANKS AND BANKING.

When a bank receives commercial paper for collection, there is an implied undertaking on its part that in case of its dishonor, it will take all steps necessary to protect the holders' rights against all previous parties to the paper. Jagger v. National German-American Bank, 386.

BILL OF EXCEPTIONS.

To review an order made upon a hearing of an application to appoint a receiver of the property of a debtor under the insolvency law of 1881, a bill of exceptions or case is necessary. *Prouty v. Hallowell*, 488.

BILLS AND NOTES. See PROTEST OF COMMERCIAL PAPER, 386.

When one buys of the payee an accommodation note supposing it a valid subsisting security, the transaction is not usurious although he bought at a discount greater than the legal rate of interest. Holmes v. State Bank of Duluth, 350.

Kopp induced Steinkamp to sign notes with him for his accommodation. Kopp then turned them over to his employer in lieu of money he had converted. *Held*, the notes were upon good consideration and valid. *C. Gotzian & Co.* v. Steinkamp, 462.

BURDEN OF PROOF.

When plaintiff brings an action against only one of the two joint debtors and alleges in his complaint that the one sued has agreed with the other to pay the debt, he must prove such agreement or fail in his action. Little v. Lee. 511.

CANVASSING BOARD. See ELECTIONS, 290.

CARRIER. See COMMON CARRIER.

CASE.

To review an order made upon the hearing of an application to appoint a receiver of the property of a debtor under the insolvency law of 1881, a case or bill of exceptions is necessary. *Prouty* v. *Hallowell*, 488.

CERTIFICATE OF SALE.

The right to apply for, and have a second certificate of sale upon execution, from the officer making such sale in certain cases, given by Laws 1862, ch. 19, survived the repeal of that chapter and was saved by 1866 G.S. ch. 121, § 4. Olsen v. Peterson, 522.

CERTIORARI.

Where the power of a municipal body to remove from office is not discretionary, but only for cause, after notice and hearing, the proceedings are judicial in their nature and may be reviewed on certiorari. State ex rel. v. Common Council of Duluth, 238.

On such review the court will see whether or not the municipal body had jurisdiction and kept within it; and whether the charges preferred were sufficient in law, and will examine the evidence, not to weigh it, but to see if it furnishes a basis for removal. Id.

The proceedings are not to be tested by the strict rules that prevail at trials in courts. *Id.*

Yet the charges should contain a specification of facts constituting a cause for removal stated with reasonable precision. *Id.*

The sufficiency and reasonableness of the charges are questions of law for the court. In this case they are held insufficient. Id.

CHALLENGE OF JUROR. See JUROR, 541.

CHARGE TO THE JURY. See PRACTICE, 116.

- Where there is no evidence of a fact, it is error for the Judge to charge that if the jury believe that fact, they can render a verdict based on it. Rugland v. Tollefsen, 267.
- A wrong charge held harmless, because the state of the case was such, that no other verdict than the one rendered could be sustained. Magner v. Truesdale, 436.
- To what extent the trial court shall call the attention of the jury to particular facts and circumstances in evidence in the case is left to its sound discretion. Watson v. Minneapolis Street-Railway Co., 551.

CIIILD. See DOMESTIC RELATIONS, 460.

CHOSE IN ACTION.

- A mere right of action for a personal injury is not assignable, nor can a lien be created upon it. Hammons v. Great Northern Ry. Co., 249.
- A single demand on contract can not be divided and made the subject of two or more different actions. Dean v. St. Paul & D. R. Co., 504.
- CITY COUNCIL. See Officer, 147; MUNICIPAL CORPORATIONS, 525, 528. Where a city council can only remove an officer for cause after notice and hearing, their proceedings may be reviewed on certiforari. State ex rel. v. Common Council of Duluth, 238.

COMMON CARRIER.

- The common carrier and shipper may fairly, and in good faith, agree upon the value of the article shipped, and fix the freight upon such valuation, and limit the liability of the carrier to such value, in case of its loss. Alair v. Northern Pacific R. Co., 160.
- A common carrier may lawfully contract that he shall not be liable as warehouseman at the end of the carriage for loss of, or damage to the property, unless claim be made therefor in writing within thirty days after the same shall have occurred. Such contract is reasonable and valid. Armstrong v. Chicago, M. & St. P. Ry. Co., 183.
- After the termination of the carriage and while the goods are held by the carrier as warehouseman, he is subject to garnishment by a stranger and is thereby excused from making delivery until delivery is ordered by the court. Cooley v. Minnesota Transfer Ry. Co., 327.
- The lien of the carrier for keeping the property as such warehouseman is superior to the claim of a pledgee of the property who procured the transposition and storage of it. *Id.*

COMPLAINT. See Pleading; Divorce, 181.

- A complaint construed and held to state a cause of action for malicious prosecution. O'Neill v. Johnson, 439.
- If a complaint failed to state definitely the breach of the contract sued on, the proper course is, to move that it be made more definite and certain.

 King v. Nichols & Shepard Co., 453.

CONSIDERATION. See Notes and Bills. 462.

- CONSTITUTIONAL LAW. See Jury, 135, 142, 419; Certificate of Sale, 522.
 - The president of the city council of the city of Minneapolis is not an "of-ficer," of the City within Const. art. 13, § 2. State ex rel. v. Kiichli, 147.

CONSTITUTIONAL LAW-Continued.

Sp. Laws 1887, ch. 8; Sp. Laws 1889, ch. 12, and Sp. Laws 1891, ch. 47, in so far as they relate to the term of office of the Judge of the Municipal Court of Mankato, are void, because that subject is not expressed in the title of either of those Acts. Const. art. 4, § 27. State ex rel. v. Porter, 279.

CONTEMPT.

- Exley v. Berryhill, 37 Minn. 182, considered to excuse from contempt, the attorney who entered judgment after appeal from an order refusing a new trial. St. Paul & D. R. Co. v. Village of Hinckley, 102.
- CONTRACTS. See Set-Off, 105; Agency, 119; Common Carrier, 160; Lease, 204; Fraud, 366; Partnership, 443; Domestic Relations, 460.
 - Certain contracts construed. American Building & Loan Ass'n v. Stoneman, 212; Merchant v. Howell, 295; Orme v. Mackubin, 412.
 - The sureties for the contractor in a contract to repair a house, held, released by subsequent alterations made in the contract by the owner and the contractor. Erickson v. Brandt, 10.

A seal imports a consideration. Id.

- The written contract for the construction of a building prevails over inconsistent statements in the specifications attached. Meyer v. Berlandi, 59.
- Where the parties proceed throughout in entire disregard of a provision in a contract, they must be held to have waived it. Id.
- Order, telegram, and letters construed, and together held to be a contract of purchase of one hundred and twenty pieces of cashmere at forty cents a yard "regular." Olson v. Sharpless, 91.
- The performance of a contract to cut, haul and so pile logs that they could be scaled on the bank, was excused as to the manner of piling them, by accepting and sawing the logs. Douglas v. Leighton, 176.
- A mere right of action for a personal injury is not assignable, nor can a lien be created upon it. Hammons v. Great Northern Ry. Co., 249.
- An ambiguous contract may be construed by reference to extrinsic circumstances, in the minds of both parties at the time it was made. Merchant v. Howell, 295.
- If a private corporation retains and uses money borrowed for it by one of its officers in excess of his authority, it thereby ratifies the transaction and is liable to the lender for the money. Willis v. St. Paul Sanitation Co., 370.
- A stranger cannot maintain an action upon a contract between others, in which one of the parties contracts to do something for the benefit of such stranger, there being no duty to him on the part of the promisee. Union Railway Storage Co. v. McDermott, 407; Jefferson v. Asch, 446.
- A contract to at once proceed to procure, and to use all reasonable efforts to procure a release, is not an absolute undertaking to procure it. Orme v. Mackubin, 412.
- A written contract for the sale of logs "boomed and delivered to tug" construed to mean enclosed in boom so that a tug could tow them away. Gasper v. Heimbach, 414.

CONTRIBUTION AMONG JOINT DEBTORS.

Where one of several jointly liable on contract, pays more than his share, the others must reimburse him for the excess paid. This rule applied to joint tenants. Van Brunt v. Gordon, 227.

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- CONTRIBUTORY NEGLIGENCE. See Negligence; Insurance, 470
- CORPORATIONS. See RECEIVER, 129; STOCKS AND STOCKHOLDERS, 214, 428; AGENCY, 870.
 - If the charter or by-laws of a corporation fix the time and place at which regular meetings shall be held, no further notice to stockholders of the meeting is necessary. Morrill v. Little Falls Mfy. Co., 371.
 - The stockholders who attend whether one or more, constitute a quorum and can transact the business, elect officers, etc. *Id*.
 - A board of directors or trustees being agents of the stockholders or constituents who elected them, requires the attendance of a quorum. Id.
 - Where stock is transferable only on the books of the corporation, the person in whose name the stock stands is entitled to vote it. The corporate books are conclusive upon the question as to who is entitled to vote the stock. *Id*.
 - If all the directors of a corporation attend a meeting and participate in the business, notice of the meeting becomes immaterial. The proceedings are valid although no notice was given. *Minneapolis Times Co.* v. *Nimocks*, 381.

COTENANCY.

Where one tenant leases his share to his cotenant and the lessee holds over after the expiration of the time, he does so as tenant and must continue to pay rent. O'Connor v. Delaney, 247.

COUNTY CANVASSING BOARD. See ELECTIONS, 290.

COVENANTS IN CONVEYANCES.

Covenant for quiet enjoyment is broken by excavations on the line for party-wall. *Collins* v. *Lewis*, 78.

CRIMES.

- ADULTERY, State v. Campbell, 354; LARCENY, State v. Bannock, 419; OBSTRUCTING RAILROAD TRACK, State v. Kluseman, 451.
- One accused of crime, if above the age at which capacity to commit crime is presumed, will not be excused by his testimony that he did not know it was wrong. State v. Kluseman, 541.

CRIMINAL LAW. See Crimes, 541; Indians, 354.

CROSS-EXAMINATION.

It is not proper on cross-examination to ask a witness the contents of a written instrument present, but not offered in evidence. O'Riley v. Clampet, 539.

CUSTOM.

A custom to treat the word "cord" in the measurement of cedar fence posts as comprising 256 feet, not conclusively proven. McManus v. Louden, 339.

DAMAGES. See SET-OFF, 105; NUISANCE, 492.

- If a lienholder be prevented from redeeming the property from a sale on a prior lien, his damages would not exceed the amount of his lien. Parker v. St. Martin, 1.
- Reasonable attorney's fees actually paid by the owner in defending against liens imposed upon his building by a contractor may be allowed against such contractor. *Erickson* v. *Brandt*, 10.



DAMAGES-Continued.

On a refusal to deliver goods purchased, the measure of the buyer's damages is the difference between the agreed price and the market value at the time and place of delivery. Olson v. Sharpless, 91.

If the vendor fail to convey the land, the vendee may recover as damages the amount of his payments as principal, interest and taxes, with interest on each payment from the time it was made. Lancoure v. Dupre, 301.

He may also recover the value of his improvements made in good faith in so far as they enhance the value of the land at the time of the rescission of the contract. Id.

The vendor is entitled to set off the rental value of the premises exclusive of improvements made by the vendee. Id.

Verdict for \$4,100 for broken leg of section man, held excessive and reduced to \$2,100. Slette v. Great Northern Ry. Co., 341.

Damages remote and speculative. In an action for malicious prosecution of a civil action, plaintiff cannot recover for injuries not the natural and proximate result of the malicious suit. O'Nell v. Johnson, 439.

and proximate result of the malicious suit. O'Neill v. Johnson, 439. Verdict for \$6,000 for injury by electric street car, held not excessive. Watson v. Minneapolis Street-Railway Co., 551.

DEED OF REAL ESTATE. See ACKNOWLEDGMENT, 560.

Where a deed is executed and delivered to a third person to be, and it is, delivered after the grantor's death, it is a good delivery and relates back so as to pass the title of the grantor from the first delivery. Haeg v. Haeg, 83.

A deed construed to grant, as appurtenant to the premises conveyed, an easement for alley purposes in adjoining land. Long v. Fewer, 156.

DEFAULT, OPENING OF. See PROBATE COURT, 529.

DISCHARGE OF MORTGAGE.

Either one of two joint mortgagees may receive payment and discharge the mortgage. Flanigan v. Seelye, 23.

DISTRICT COURT. See APPEAL FROM JUSTICE'S COURT, 54, 232.

The District Court is always open for all business except the trial of issues of fact. An appeal from a Justice on questions of law alone may be brought on for hearing at any time. Rollins v. Nolling, 232.

DIVORCE.

Facts which would entitle plaintiff to a limited divorce may be joined in a complaint with those justifying an absolute divorce, and thereupon relief may be sought in the alternative form. Grant v. Grant, 181.

Desertion, and conduct rendering it unsafe and improper for the wife to cohabit with the husband, held sufficiently stated in the complaint. Id.

A voluntary consent and agreement to live apart is not desertion. Hosmer v. Hosmer, 502.

DOCKET ENTRIES. See JUSTICE'S COURTS, 54.

DOMESTIC RELATIONS.

The presumption is that a son who, after arriving at his majority, continues a member of his father's family, does so not as a servant for wages, but as before. Yet this presumption may be removed by evidence indirect or circumstantial, by the conduct or conversations of the parties, or by the admissions of the father. Donahue v. Donahue, 460.

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DOMESTIC RELATIONS-Continued.

Such evidence is not required to be clear, direct and certain. It must be such as to reasonably satisfy the jury. *Id*.

DRUNKENNESS. See Crimes, 541.

DULUTH CITY CHARTER.

The City Charter of Duluth vests the power of removing the Fire Commissioners from office, exclusively in the Common Council and a resolution preferring charges and fixing a time and place of hearing is not one which requires the approval of the Mayor. State ex rel. v. Common Council of Duluth, 238.

EASEMENT. See DEED OF REAL ESTATE, 156.

EJECTMENT. See Landlord and Tenant, 46, 483.

ELECTIONS.

An election contest over a county office conducted under Laws 1891, ch. 4, must be instituted by an appeal to the District Court and entered with the Clerk, within twenty days after the day of election. Seeley v. Killoran, 290.

EMINENT DOMAIN. See HIGHWAYS, 68.

- A law for taking private property for public use is valid if it impose upon the municipality benefited the duty of paying therefor. State ex rel. v. Otis, 318.
- If in advance of any hearing, a limited district is designated as embracing all the property benefited, the assessments will be invalid. *Id.*

ERROR, ASSIGNMENTS OF.

Certain assignments of error held not well taken in view of the evidence in the case. Watson v. Minneapolis Street Ry. Co., 551.

ESTATES OF DECEASED PERSONS. See PROBATE COURT, 529.

- EVIDENCE. See Damages, 91; Witness, 360, 386, 551; Domestic Relations, 460; Crimes, 541.
 - Figures on the upper left hand corner of a receipt may be resorted to, for the purpose of aiding the imperfect writing in the body of the instrument. Gran v. Spangenberg, 42.
 - Ownership of real estate proved or admitted to have existed is presumed to have continued until it is shown to have ceased. Lind v. Lind, 48.
 - On the examination of a witness a party offered a document saying that he offered it in connection with the testimony of the witness. It did not explain or support such testimony and was properly rejected. Meyer v. Berlandi. 59.
 - The official certificate of acknowledgment of the execution of an instrument constitutes prima facie proof of its execution. Romer v. Conter, 171.
 - A judgment, as against one not a party to it, is evidence of its own existence only; not of any fact on which it was recovered. American Building & Loan Ass'n v. Stoneman, 212.
 - To explain an ambiguous contract it is competent to show extrinsic circumstances known to both parties when the contract was made. Merchant v. Howell, 295.

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EVIDENCE—Continued.

The entry in a merchant's account books charging to C goods delivered to him by defendant's request, is not conclusive evidence that the goods were sold C and not to defendant. But the fact that the entries were so made, is a circumstance for consideration, upon the question who was in fact the purchaser. Culter v. Scott & Holston Lumber Co., 360.

Secondary evidence of the contents of a written demand of payment of a call upon defendant's subscription to stock, held proper after notice to him to produce the original notice. Minneapolis Times Co. v. Nimocks, 331.

A written contract can not be varied by contemporaneous oral understanding. Gasper v. Heimbach, 414.

When the evidence is conflicting as to the oral contract price, market value may be shown to corroborate the witness. Saunders v. Gallagher, 422.

An objection to evidence which might be obviated by other evidence, must be specific so that such other evidence may be supplied. King v. Nich-

ols & Shepard Co., 453.

Evidence of a contract between father and son as to the son's services after attaining his majority is not required to be clear, direct and certain. It may be indirect or circumstantial. The contract may be shown by the conduct or conversations of the parties or the admissions of the father. Donahue v. Donahue, 460.

In civil actions it is sufficient if the evidence on the whole, agrees with and supports the hypothesis which it is adduced to prove. Lillstrom

v. Northern Pacific R. Co., 464.

Admissions of a party to the action, made to third persons touching the property in controversy held competent. Olson v. Swenson, 516.

But the declarations of such third persons not parties, respecting the own-

ership of the property are incompetent. Id.

One who has witnessed a person's acts, appearance and speech may express an opinion whether he was intoxicated or not. *McKillop* v. *Duluth Street-Railway Co.*, 532.

It is not proper to ask a witness the contents of a written instrument not in evidence. This rule holds on cross-examination as well. O'Riley v. Clampet, 539.

A party's pleadings may be evidence against him in another action as his admissions, but the judgment is not if the parties to the two actions are not the same. Id.

EXCEPTIONS. See BILL OF EXCEPTIONS, 488.

EXCEPTIONS TO CHARGE. See CHARGE TO THE JURY.

EXCEPTIONS TO EVIDENCE. See EVIDENCE; PRACTICE.

EXPERT WITNESS. See WITNESS; VALUE, 560.

FATHER AND SON. See DOMESTIC RELATIONS, 460.

FINDINGS OF FACTS.

Sustained by the evidence. Haeg v. Haeg, 33; Elfelt v. Stillwater Street-Railway Co., 68; State v. Woodling, 142; O'Connor v. Delaney, 247; Reynolds v. Curtiss, 257; Hendrickson v. Tracy, 404; Orme v. Mackubin, 412; Fountain v. Menard, 443; Hosmer v. Hosmer, 502; Roussain v. Norton, 560.

Not sustained. Sandberg v. Palm, 252; Morrill v. Little Falls Mfg. Co., 371; Burns v. Phinney, 431; Gates v. Banholzer, 514.

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- FORCIBLE ENTRY AND UNLAWFUL DETAINER. See LANDLORD AND TENANT, 483.
- FORECLOSURE OF MORTGAGE. See REDEMPTION FROM SALE, 1; USURY, 350.
 - Service of notice of foreclosure upon the occupant of the premises is good, if in the temporary absence of the occupant the notice is left with his child fourteen years old then resident therein. *Temple* v. *Norris*, 286.
 - Money paid to a sheriff to redeem land from a foreclosure sale under a power in the mortgage, is received by him by virtue of his office. The attorney employed to foreclose has not from that fact authority to demand and receive from the sheriff the money so paid. In re Grundy-sen, 346.
 - The foreclosure of a mortgage under a power of sale, is not a special proceeding within 1878 G. S. ch. 88, § 9. Id.

FORMER SUIT IN BAR.

- Proceedings to sequestrate the property of a corporation under 1878 G. S. ch. 76, § 9, for the benefit of its creditors are not prevented by the pendency of a suit to foreclose a mortgage on its property in which a receiver has been appointed. St. Louis Car Co. v. Stillwater Street-Railway Co., 129.
- FRAUD. See Trusts, 39, 123; Frauds, Statute of, 110; Limitation of Actions, 371; Pleading, 371.
 - Fraud in preventing the revocation of a will, condoned by the testator, so that after his death his heir had no right of action for the fraud. Graham v. Burch, 17.
 - Where one of the parties to a written contract was induced to execute it by the intentional fraud of the other, he may defend against its enforcement notwithstanding he lacked business prudence in executing it. Alfred Shrimpton & Sous v. Philbrick, 366.

FRAUDS, STATUTE OF.

- The fraudulent sale of a chattel by the bailee thereof is not helped by statute regarding sales fraudulent as to subsequent purchasers. *Hedderly* v. *Backus*, 27.
- Transfers of goods and chattels with intent to hinder, delay or defraud creditors or others are voidable, although goods and chattels are omitted from the statute. Byrnes v. Volz, 110.
- The principle is applicable also as to subsequent creditors intended to be defrauded. It is operative in favor of a wife suing for alimony. Id.
- The person receiving the transfer can not retain for his own claim or for the claims of others paid by him and which the parties agreed should be paid out of the property transferred. *Id.*
- A partnership may be formed by parol to buy, improve, rent and sell real estate. Fountain v. Menard, 443.
- No delivery of the goods shown sufficient to take the sale out of the statute. Hart v. Kessler, 546.

FRAUDULENT CONVEYANCES.

- Transfers of, and claims to, property, held fraudulent as against creditors. Olson v. Swensen, 516.
- FREIGHT. See COMMON CARRIER, 160.

GARNISHMENT.

A railway company after the termination of the transportation of the property and while it is holding the same only as warehouseman, is liable to garnishment in respect to such property, and such garnishment excuses nondelivery. Cooley v. Minnesota Transfer Railway Co., 327.

GRANTOR AND GRANTEE.

Where a deed is duly executed and delivered to a third party to be delivered after the death of the grantor, it will be a good delivery after the grantor's death and pass the title to the grantee by relation from the first delivery. Haeg v. Haeg, 33.

GRAVES AND GRAVESTONES AS NOTICE OF POSSESSION.

They do not necessarily indicate a present continued exercise of dominion over the land so as to be notice to a purchaser from the record owner that some other person claims it. Roussain v. Norton, 560.

HIGHWAY. See STREETS, 68.

When a road has been continuously used, kept in repair and worked for six years it is a highway by statute. This effect is not altered by the fact that proceedings previously commenced to lay it out as a highway are still pending. Elfelt v. Stillwater Street-Railway Co., 68.

When a road is openly and notoriously used as a highway by the public and is recognized by a railway company as such by permitting the public to cross the track and by assuming to maintain a crossing at that point, it is immaterial that the road has not been legally laid out or established.

Lillstrom v. Northern Pacific Railroad Co., 464.

Streams navigable for logs and lumber when so used are in most respects governed by the rules applicable to highways. Paige v. Mille Lacs Lumber Co., 492.

Parties who use such streams, must do so with due deference to the rights of others. Id.

Those individuals who suffer special and particular injury and damage from obstructions of such streams, distinct and apart from the common injury may have a private action for redress. Id.

A street railway car has no priority of way at a street crossing with respect to other vehicles. Watson v. Minneapolis Street-Railway Co., 551.

INDEMNITY.

If a mortgagee holding a bond of indemnity against paramount liens, foreclose and bid in the property for the full amount of his claim, he has no longer a cause of action on the bond. American Building and Loan Ass'n v. Stoneman, 212.

INDIANS.

The criminal laws of this State extend to all crimes committed on an Indian Reservation by persons other than tribal Indians, except as restricted by Federal authority. State v. Campbell, 354.

Indians while preserving their tribal relations are not subject to the criminal laws of this State for acts committed upon their reservation. Id.

INDICTMENT.

An indictment for placing an obstruction upon a railroad track by piling cross ties thereon, construed and held sufficient. State v. Kluseman, 541.

INFANCY. See CRIMES, 541.

INJUNCTION.

It is within the reasonable discretion of the court to dissolve a temporary injunction which restrains the construction of a railroad, pending the litigation as to a right of way over some city lots. Myers v. Duluth Transfer Railway Co., 335.

INSOLVENCY. See Assignment, 201.

- A failing corporation owed defendants a certain amount payable in sash and doors to be manufactured by it on demand. Defendants were owing the corporation upon account. The corporation being insolvent made an assignment. Held the two demands might be set off. Laybourn v. Seymour, 105.
- In insolvency proceedings under Laws 1881 ch. 148, upon an assignment by a corporation the court may make or direct calls upon the unpaid subscriptions to stock subject to call. In re Minnehaha Driving Park Ass'n, 423.
- Proof of a claim against the insolvent, if made to and approved by the receiver or assignee and his decision is acquiesced in is final. *Id*.
- But the debtor or any one interested may if dissatisfied apply to the court and have a judicial examination and decision of such claim. Id.
- Such examination and review of the claim must be had in a direct proceeding for that purpose. It can not be had in a collateral matter such as a proceeding to declare a dividend, or to call in assets. *Id.*
- To review on appeal an order made upon the hearing of an application to appoint a receiver of the property of a debtor under the insolvency law of 1881 a case or bill of exceptions is necessary. *Prouty* v. *Hallowell*, 488.

INSURANCE. See Agency, 220.

- Benson, whose life was insured against accident, died from a fall, and his friend Jones gave notice to, and made and filed proofs of death with, the Insurance Company. Afterwards Wilson was appointed administrator of Benson's estate and with the implied consent of the Company adopted the proofs filed by Jones; held, proofs sufficient under the policy. Wilson v. Northwestern Mutual Accident Ass'n, 470.
- Where the occupation of "pointer" is not mentioned in the Insurance Company's manual of classification, it is not classed as noninsurable. Id.
- It is not a defense that the assured voluntarily exposed himself to danger, or that the accident was caused by the mere carelessness or negligence of the assured. *Id*.
- "If the insured building become vacant and unoccupied." A policy construed as to this clause. *Mortarty* v. *Home Insurance Co.*, 549.

INTEREST. See Usury.

JOINDER OF CAUSES OF ACTION.

- Facts which would entitle a plaintiff to a limited divorce may be joined in a complaint with facts justifying an absolute divorce. Grant v. Grant, 181.
- In an action by husband and wife to avoid usurious securities, given by them upon a loan made to the wife, it is improper to join a cause of action by the wife alone to recover money paid by her upon the usurious contract. Anderson v. Scandia Bank, 191.

JOINT DEBTORS.

If one pay more than his share, he is entitled to repayment by the others. Van Brunt v. Gordon, 227.

JUDGMENTS. See SUMMONS, SERVICE OF, 315; EVIDENCE, 539.

- As against strangers to the judgment, it is evidence only of its own existence; not of any facts on which it was recovered. American Building and Loan Ass'n v. Stoneman, 212.
- An entry of judgment in a municipal court, held, sufficient in form. Norton v. Beckman, 456.
- Judgment on the pleadings may be entered in proceedings by a landlord to remove his tenant under 1878 G. S. ch. 84, as in other actions. Norton v. Beckman, 456.

JUDICIAL OFFICERS. See Assessors, 62.

JUDICIAL SALES. See CERTIFICATE OF SALE, 522.

JURISDICTION. See Elections, 290.

- An appearance in an action for any other purpose than to question the jurisdiction of the court, is general and gives the court jurisdiction of the defendant so appearing. St. Louis Car Co. v. Stillwater Street-Railway Co., 129.
- Under Laws 1881 Ex. Sess. ch. 81, the fact that the named defendant was dead when the action was commenced will not prevent the court from acquiring jurisdiction to determine the rights of other persons or parties unknown claiming an interest in the land. *Inglee* v. Welles, 197.

When it appears that the return to this court was not in fact made and signed by the inferior court or its proper officer, this court has no jurisdiction to review the case. Patge v. Mille Lacs Lumber Co., 492.

An unauthorized appeal was taken to the District Court. The parties appeared in that court, amended their pleadings, and had the case set for trial by jury on a particular day of the term. These acts gave the District Court jurisdiction of the case. Wrolson v. Anderson, 508.

JUROR.

Where the court, on the challenge by the State, improperly rejects a juror, it will not prejudice the accused if he is tried by an impartial jury. State v. Kluseman, 541.

JURY TRIAL. See JUROR, 541.

If a person be arrested as a conditionally pardoned convict violating the condition, and he deny that he is the convict so pardoned, he is entitled to a trial of that question by jury. State ex rel. v Wolfer, 135.

One accused of a misdemeanor may waive a jury and consent to be tried before the Justice or Judge. State v. Woodling, 142; State v. Bannock, 419.

The right having been once waived can not be recalled. State v. Bannock, 419.

If the jury are unable to agree after a reasonable time, they may be discharged and a new trial begun. Rollins v. Nolting, 232.

Jurors' fees must, in a Municipal or Justice's Court, be paid in advance. If the party calling for a jury neglect or refuse to so pay in advance, the court may proceed to try the case without a jury. Rollins v. Nolting, 232; McGeagh v. Nordberg, 235.

JURY TRIAL-Continued.

- The waiver of a jury when a cause is called for trial, is only a waiver of jury trial of the issues then formed. If different issues be subsequently formed, the waiver will not apply to them. *McGeagh* v. *Nordberg*, 235.
- A jury will be presumed to have been impartial if nothing appear to the contrary. State v. Kluseman, 541.
- When a jury report they cannot agree, it is in the discretion of the court to send them back for further deliberation. Watson v. Minneapolis Street-Railway Co., 551.
- In such case it is proper for the court to urge them to use all reasonable efforts to come to an agreement and to state as a reason for it, that the case is an expensive one to try. *Id.*

JUSTICES' COURTS. See APPEAL FROM JUSTICES' COURTS.

- The omission of a justice to state in his docket the fees due to each person separately, does not render the judgment erroneous. *Meister* v. *Russell*, 54.
- A writ of attachment issued by a Justice of the Peace is sufficient to give jurisdiction if it be in the form prescribed by statute, although it omit to state the town in which the Justice holds his office. Beseman v. Weber, 174.
- Jurors' fees must be paid in advance before the order is given the officer to make a list. Rollins v. Nolling, 232.
- If the jury are unable to agree in a reasonable time, the Justice may discharge them and proceed with a new trial of the case. *Id.*

LANDLORD AND TENANT. See MINNEAPOLIS MUNICIPAL COURT, 96; LEASE, 204.

- When the title to real estate of one, whose tenant is in possession, passes under execution sale, such former owner is no longer in possession, so that an action in ejectment can be maintained against him. Gowan v. Bensel, 46.
- Landlord made an agreement for a party wall with adjacent owner. The excavations he made for it were a breach of the covenant for quiet enjoyment, and the tenant was allowed to counter claim damages against the rent. *Collins* v. *Lewis*, 78.
- If a writ of restitution be falsely returned executed, the return may be set aside and an alias writ issued. Suchaneck v. Smith, 96.
- Where one cotenant rents his share to the other, and the lessee holds over after the expiration of the term, he does so in his character of tenant and must continue to pay rent. O'Connor v. Delaney, 247.
- In proceedings by a landlord against his tenant under 1878 G. S. ch. 84, judgment on the pleadings may be ordered as in other cases. Norton v. Beckman, 456.
- In proceedings under this statute, affirmative relief under a clause to renew the lease cannot properly be interposed as an answer. If interposed the case cannot for that reason be certified to the District Court. Id.
- If the tenant assign his lease and the landlord consent and accept the assignee as tenant in his stead, the original tenant is discharged from liability for future accruing rent. Bowen v. Haskell, 480.
- Proceedings to remove a tenant under the forcible entry and unlawful detainer statute 1878 G. S. ch. 84 have no application to actions originally brought in the District Court. State ex rel. v. District Court, 483.

LEASE. See COVENANTS AND CONVEYANCES, 76; LANDLORD AND TEN-ANT, 247, 456, 480.

By the terms of a lease the owner on default of payment of rent or taxes was authorized to declare the lease ended and to re-enter, or he could pay the taxes and foreclose and sell the lessee's structures and improvements and from the proceeds pay the rent and taxes; held, that he had not by indulgence and delay, lost the right to either remedy. Douglas v. Hermes, 204.

LIENS. See MECHANICS' LIENS: REDEMPTION FROM SALE, 1.

LIFE INSURANCE. See INSURANCE, 470.

LIMITATION OF ACTIONS.

The holder of a tax title declared invalid by a judgment of court, has at once a claim to be repaid his money and interest under 1878 G. S. ch. 11, § 97, as amended by Laws 1881, ch. 10, and the statute of limitation of actions begins to run against such claim from the day of the entry of such judgment. *Easton v. Sorenson*, 309.

Where a party seeks relief on the ground of fraud, more than six years after the commission of the acts constituting the alleged fraud, he must allege and prove that the facts were not discovered, until within six years next before suit begun. Morrill v. Little Falls Mfg. Co., 371.

The exclusive occupancy of land for fifteen years by a railroad for station yard purposes which had been previously dedicated but not used for a street, held not averse to the public so as to confer title by adverse possession. St. Paul & D. R. Co. v. Village of Hinckley, 398.

LOGS AND LUMBER.

The obstruction of a stream navigable for logs and lumber may be a private nuisance as well as a public. Those individuals who suffer special and particular damage therefrom distinct and apart from the common injury, may have a private action for redress. Paige v. Mille Lacs Lumber Co., 492.

Parties who use such streams must do so with due deference to the rights of others. Id.

In most respects such streams when used for floating logs, are governed by the rules applicable to highways upon land. Id.

Defendant by its dams, mills, booms, sorting gaps and manner of detaining and sorting logs, inflicted special injury upon the plaintiffs, differing in kind and not merely in degree or extent, from that suffered by the general public. *Id.*

MALICIOUS PROSECUTION.

A criminal prosecution is without probable cause where facts exculpating the accused are easily ascertainable and the complainant has notice sufficient to put him upon inquiry. Boyd v. Mendenhall, 274.

An action will lie for the malicious prosecution of a civil action. O'Neill v. Johnson, 439.

MASON WORK. See Pointing, 470.

MASTER AND SERVANT. See Negligence, 29, 341.

MECHANICS' LIENS.

If the last item in a lien statement is not proved it is not fatal to the whole claim, provided the statement for lien was filed within the time allowed after the last item stated in it and proved. Lundell v. Ahlman, 57.

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MECHANICS' LIENS-Continued.

A mechanic's right to file and enforce a lien may be waived in consideration of money paid him by a third party having a subsequent mortgage. Burns v. Carlson, 70.

The right to file such lien is not an estate or interest in land and may be

surrendered without deed or conveyance in writing. Id.

If the action to foreclose the lien is not commenced within a year after the date of plaintiff's last item, he cannot recover, but this will not prevent a recovery by a lien claiming defendant whose answer is filed within a year after the date of his last item. Sandberg v. Palm, 252.

Knowledge in an agent, authorized only to sell real estate, that a building is being constructed on it, is not knowledge in the owner for the pur-

poses of Laws 1889, ch. 200, § 5. 1d.

- Mechanics' liens date from the time of the performance of the first work, or delivery of the first material, on the ground, that is, from the commencement of the improvement on the premises. Wentworth v. Tubbs, 388.
- A mortgagee held not entitled to be subrogated to the rights of lien holders whose liens he had paid with the money he loaned. *Id.*
- A lien claimant who does not within the year bring suit himself nor appear and answer in a suit brought by others, and ask to foreclose his lien, is barred of his lien on the property. Burns v. Phinney, 431.

If he appears in an action brought by others and asserts his lien, he makes the action his own for the purpose of enforcing his lien. *Id.*

The fact that the plaintiff in such action is or may be barred of a lien, will not affect such lien claiming defendant. *Id*.

MINNEAPOLIS MUNICIPAL COURT.

This court has jurisdiction to set aside a sheriff's return upon a writ of restitution and issue an alias writ. Suchaneck v. Smith, 96.

If the party demanding a jury in a civil action, fails or refuses to pay the jury fee on the call of the calendar on the first day of the term, he thereby waives trial by jury. McGeagh v. Nordberg, 235.

MISDEMEANORS.

One accused of a misdemeanor may waive trial by jury. State v. Woodling, 142; State v. Bannock, 419.

The right having been waived can not be recalled at will. State v. Bannock, 419.

MISTAKE. See REFORMATION OF CONTRACTS, 201.

MORTGAGE. See REDEMPTION FROM SALE, 1; USURY, 350.

MORTGAGOR AND MORTGAGEE.

Either one of two joint mortgagees may receive payment and discharge the mortgage. Flanigan v. Seelye, 23.

A tender of payment to either is good. Id.

If a mortgagee holding a bond of indemnity against paramount liens foreclose and bid in the property for the full amount of his claim, he has no longer a cause of action on the bond. American Building and Loan Ass'n v. Stoneman, 212.

MOTIONS.

A motion to make more definite and certain, is the proper course if the complaint does not definitely state the breach of the contract on which the action is founded. King v. Nichols & Shepard Co., 453.

MUNICIPAL CORPORATIONS.

Cities have no power to give public money to private parties to establish and operate manufacturing plants within their limits. City of Chaska v. Hedman, 525; Griffin v. City of Shakopse, 528.

Where the officers of a municipal corporation pay out its money upon a contract which the corporation has no power to make, the payment is not an act of the corporation, and it may recover the money paid. Id.; Id.

MUNICIPAL COURTS. See MINNEAPOLIS MUNICIPAL COURT, 96.

MUTUAL ACCIDENT INSURANCE. See INSURANCE, 470.

NAVIGABLE STREAMS.

The obstruction of a stream, navigable for logs and lumber, may be a private nuisance as well as a public. Those individuals who suffer special and particular damage therefrom, distinct and apart from the common injury, may have a private action for redress. Paige v. Mille Lacs Lumber Co., 492.

Parties who use such streams must do so with due deference to the rights of others. Id.

In most respects such streams when used for floating logs are governed by the rules applicable to highways upon land. *Id.*

Defendant by its dams, mills, booms, sorting gaps and manner of detaining and sorting logs, inflicted special injury upon plaintiffs, differing in kind, and not merely in degree or extent, from that suffered by the public in general. *Id*.

NEGLIGENCE. See Insurance, 470.

An employe was injured while putting a rosser chain in place upon a sprocket wheel near machinery not properly covered and guarded. The questions of negligence of both employer and servant were for the jury. Mullin v. Northern Mill Co., 29.

Failure to maintain a gate in good repair at a farm crossing, found to be such negligence as to render the Railroad Company liable for stock killed on its track. Chisholm v. Northern Pacific R. Co., 122.

Running a freight train at excessive speed justified a finding that it was negligence, and a proximate cause of a collision with the hand car of the section men. Slette v. Great Northern Railway Co., 341.

The failure of the foreman to stop in proper time and take the hand car off the track, might be negligence of such foreman, and not negligence of the men on it, under his command. *Id*.

One attempting to cross a railroad track at a street crossing must look both ways, when there is nothing to prevent, to see if there is danger. If he fails to do so and is injured he is guilty of contributory negligence and cannot recover damages. Magner v. Truesdale, 436.

It was negligence for a railroad company to take up the planking at a crossing over its tracks which the public had with its assent been accustomed to use as a highway, and fail to put up notice or barrier to warn travelers. Lillstrom v. Northern Pacific R. Co., 464.

If a street-railway company without any direction from the municipal council, lays its track in accordance with a grade established for a paving of the street, contemplated but not yet done, and so laying the track, renders the street until paved, unsafe, it is an act of negligence on the part of the company. McKillop v. Duluth Street Railway Co., 532.

NEGLIGENCE—Continued.

A teamster was injured while crossing the track of an electric street iailway. Charge of negligence and counter charge of contributory negligence discussed upon the facts in that case. Watson v. Minneapolis Street Railway Co., 551.

At a street crossing, as high a degree of care is required of those in charge of an electric street car, as of those driving other vehicles. *Id.*

Upon a much traveled street in a city it is negligence to run an electric street car over a crossing at a high rate of speed, or without having the car under control, or without the proper means to stop it, or without a conductor or other person on the lookout. Id.

NEGOTIABLE PAPER. See BILLS AND NOTES.

NEW TRIAL. See APPEAL TO SUPREME COURT, 431.

Upon an appeal from a Justice on questions of law alone, the District Court may, after a decision, reconsider and modify its first decision of the case. *Meister* v. *Russell*, 54.

An order granting a new trial on the evidence will not be reversed merely because against the preponderance of evidence. Lundell v. Ahlman, 57.

If no exception be taken to the Judge's charge the defeated party can not have a new trial on the ground that the charge was erroneous to his prejudice. Bergh v. Sloan, 116.

Receiving immaterial evidence over objection, held harmless in this instance. Drews v. Ann River Logging Co., 199.

For a broken leg of section-man, the jury awarded \$4,100; held excessive, and new trial ordered, unless plaintiff consent to reduce to \$2,100. Slette v. Great Northern Ry. Co., 341.

Irrelevant evidence was admitted but was not prejudicial or ground for a new trial, for the reason that substantially the same evidence had been previously admitted without objection. Alfred Shrimpton & Sons v. Philbrick, 366.

If a party go to trial without seeking postponement to enable him to find a material absent witness, he will not be granted a new trial if he subsequently finds the witness, and is able to secure his attendance. *Hendrickson* v. *Tracy*, 404.

NEWLY-DISCOVERED EVIDENCE. See New TRIAL, 404.

NOTARY PUBLIC.

Where an officer has authority to take acknowledgments anywhere in the State, the insertion in the venue to the certificate, of a wrong name for the county where taken, will not affect its validity. Roussain v. Norton. 560.

NOTES AND BILLS. See BILLS AND NOTES.

NOTICE.

If notice is to be given by publication for a specified number of weeks, it is not necessary that the publications should be made at regular intervals of just seven days. Raunn v. Leach, 84.

One purchasing real estate from the person appearing from the records to be the owner, is not chargeable with notice of an adverse claim, from the fact that it is assessed for taxation to another person. Roussain v. Norton, 560.

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NOTICE—Continued.

Possession of land, to be notice of the possessor's rights must be a present possession. A former possession which has ceased though there be still evidence of it on the land, will not suffice. Id.

Where the possession is not shown by residence on the land, it must be shown by acts of dominion over it such as indicate not mere casual

entries but a continued claim of right. Id.

Graves and gravestones on one corner of the land held not indicative of a present continued exercise of dominion over the land so as to be notice to a purchaser from the record owner of an adverse claim of other persons. Id.

NUISANCE.

The obstruction of a stream navigable for logs and lumber may be a private nuisance as well as a public. Those individuals who suffer special and peculiar damage therefrom distinct and apart from the common injury may have a private action for redress. Paige v. Mille Lacs Lumber Co., 492.

Parties who use such streams must do so with due deference to the rights of others. Id.

Defendant by its dams, mills, booms, sorting gaps and manner of detaining and sorting logs, inflicted special injury upon plaintiffs, differing in kind, and not merely in degree, or extent, from that suffered by the general public. Id.

OBSTRUCTING RAILROAD TRACK. See INDICTMENT, 541.

OFFICER. See ACKNOWLEDGMENT, 560.

The president of the city council of the City of Minneapolis is not an "officer" of the City within the meaning of either the city charter or the Const. art. 13, § 2, and is removable at the pleasure of that body. State ex rel. v. Kiichli, 147.

Where a municipal body can only remove an officer for cause after notice and hearing, the proceedings may be reviewed on certiorari. State ex

rel. v. Common Council of Duluth, 238.

In such case "sufficient cause for removal" means legal cause and must be a cause that specially relates to and affects the administration of the office; one touching the qualifications of the officer or his performance of his duties. Id.

OPINIONS WHEN ADMISSIBLE EVIDENCE. See VALUE, 560.

One who has witnessed a person's acts, appearance and speech may express an opinion whether he was intoxicated or not. McKillop v. Duluth Street Railway Co., 532.

It is so in respect to joy, grief, hope, despondency, friendliness, hostility

fright, jest and manner, sickness and sanity. Id.

One who has been a conductor of an electric street car for two months is competent to testify, within what distance such a car going at a specified speed, can be stopped. Watson v. Minneapolis Street Railway Co., 551.

PARDONS.

A convict who has received pardon on condition that he reside out of this State, cannot be arrested and recommitted to serve out his original sentence, upon the mere order of the Governor. He is entitled to a hearing before a court. State ex rel. v. Wolfer, 135.

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PARDONS—Continued.

If the party so arrested denies that he is the convict so pardoned, he is entitled to a trial of that question by jury. Id.

Other questions may, or may not, be submitted to a jury as in its discretion, the court shall think fit. Id.

PARTIES TO ACTIONS.

- The insolvent is not a necessary party to an action instituted by an assignee or receiver under Laws 1881, ch. 148, § 4, to avoid a conveyance made, to prefer one creditor over others. Williamson v. Selden,
- A person having no interest in the subject of an action is not a necessary
- party thereto. Anderson v. Scandta Bank, 191. Under Laws 1881, Ex. Sess. ch. 81, the fact that the named defendant was dead when the action was commenced, will not prevent the court from acquiring jurisdiction to determine the rights of "other persons or parties unknown" claiming an interest in the land. Inglee v. Welles, 197.
- A stranger cannot maintain an action upon a contract between others, in which one of the parties contracts to do something for the benefit of such stranger, there being no duty to him on the part of the promisee. Union Railway Storage Co. v. McDermott, 407; Jefferson v. Asch.
- An assignment of a part interest in a claim may be made and the courts will recognize and protect the assignment; but a separate and independent action cannot be maintained by the assignee. All the part owners should be made parties. Dean v. St. Paul & D. R. Co., 504.
- When plaintiff brings an action against only one, of two joint debtors, and alleges that the one sued has agreed with the other to pay the debt, he must prove such agreement or fail in his action. Little v. Lee, 511.

PARTNERSHIP.

A partnership may be formed by parol to deal in real estate, or to buy, improve, rent and sell a particular piece of real estate. Fountain v. Menard, 443.

PAYMENT.

- A payment of the debt to either one, of two joint mortgagees is good, and extinguishes the mortgage. Flanigan v. Seelye, 23.
- Payment by a third person of a part, in satisfaction of the whole, debt will extinguish it. Clark v. Abbott. 88.
- A borrower who voluntarily repays part of a usurious loan, or pays interest thereon not exceeding ten per cent. a year, can not recover such payment. Anderson v. Scandia Bank, 191.
- A payment by one of several joint debtors of more than his share of the debt, entitles him to repayment from the others of the excess. Van Brunt v. Gordon, 227.
- Where the officers of a municipal corporation pay out its money, upon a contract which the corporation has no power to make, the payment is not the act of the corporation and it may recover the money paid. City of Chaska v. Hedman, 525; Griffin v. City of Shakopee, 528.

PERFORMANCE OF CONTRACT.

Performance in the manner contracted for, was excused by accepting as performed. Douglas v. Leighton, 176.

PERSONAL INJURIES.

Employee injured in putting rosser chain in place, on a sprocket wheel in a sawmill. Mullin v. Northern Mill Co., 29.

A claim for damages for a personal injury is not assignable, nor can a lien be created thereon by agreement between attorney and client. Hammons v. Great Northern Ry. Co., 249.

Section man injured by freight train, running at excessive speed, and striking him while he was aiding in removing a hand-car from the track, ahead of it. Slette v. Great Northern Ry. Co., 341.

Traveler on foot killed at a street crossing by freight car, making flying switch. Mayner v. Truesdale, 436.

Teamster killed, in being thrown from his load, on an unplanked railroad crossing. Lillstrom v. Northern Pacific R. Co., 464.

Feamster injured, street railway track raised above the surface of the street as then travelled. McKillop v. Duluth Street Railway Co., 532.

Teamster injured by electric street car while crossing the street-car track.

Watson v. Minneapolis Street Railway Co., 551.

PLACE OF TRIAL.

Judgment reversed for refusal to change the place of trial for convenience of witnesses. Olivier v. Cunningham, 521.

PLEADING. See DIVORCE, 181; JOINDER OF CAUSES OF ACTION, 181, 191; Parties to Actions, 511; Evidence, 589.

In a complaint to enforce a trust arising under 1878 G. S. ch. 43, § 9, it should be distinctly alleged that the alience named in the conveyance, took the same in his own name without the consent of the person paying the purchase money. This should not be left to inference. Petzold v. Petzold, 39.

A general allegation in a complaint is of no avail, as against the specific facts pleaded therein. Gowan v. Bensel, 46.

The order of pleading stated, in an action to recover for extras furnished for a building, beyond the specifications in the building contract. Meyer v. Berlandi, 59.

A sham answer, although verified, may be stricken out on motion. Dobson v. Hallowell, 98.

Several plaintiffs suing as indorsees of promissory notes alleged that they were partners, held, this was an immaterial averment. Id.

An answer stating the note in suit was given in part payment for a horse, and that plaintiff guaranteed him to be a full Clydesdale, and registered, and that plaintiff would furnish the certificate of registration within ninety days, otherwise the note to be void, states a good defense. Allen v. Swenson, 133.

The rule, that a complaint need not anticipate and negative matter of defense, applied. Romer v. Conter, 171.

Facts which would entitle plaintiff to a limited divorce, may be joined in a complaint with those justifying an absolute divorce. *Grant* v. *Grant*, 181.

Relief may be asked in the alternative. Id.

Stockholders, seeking to set aside a deed of their corporation on the ground of fraud in obtaining it, must allege the facts constituting the fraud. They cannot prove the fraud under a mere denial of the execution of the deed. Morrill v. Little Falls Mfy. Co., 371.

When a bank receives a note for collection, it impliedly undertakes to protest and give notice, in case of dishonor. An allegation that the holder,

PLEADING-Continued.

instructed the bank to do so, only states what the law implies, and does not change the issue or the burden of proof. Jagger v. National German-American Bank, 386.

An objection, that the complaint does not state the particulars of a breach of the contract sued on, ought to be taken by motion to make the complaint more definite and certain. King v. Nichols & Shepard Co., 453.

An allegation that plaintiff will be obliged to expend \$500 to put in order the machine he purchased of defendants, is equivalent to an allegation that the reasonable cost, will be that sum. *Id*.

PLEDGE.

The right of a pledgee to the pledge, is subject to the lien of the carrier and warehouseman whom he employs to transport and store it. Cooley v. Minnesota Transfer Ry. Co., 327.

Evidence held to conclusively show that the owner pledged the property to secure indebtedness. Id.

A pledge was not relinquished by shipping it consigned to the pledgers; both parties arranging at the time of shipment, that the pledgee should appear at the termination of the carriage and receive the pledge. *Id.*

A subsequent garnishment of the carrier by a creditor of the pledgor did not give such creditor a right superior to that of the pledgee. *Id.*

A sale of the pledge by the owner to the pledgee, subsequent to such garnishment, did not alter the relative rights of the creditor and pledgee. Id.

POINTING.

Is a part of mason work. Wilson v. Northwestern Mutual Accident Ass'n, 470.

POLICY OF INSURANCE.

A policy construed, as to the insured building becoming vacant and unoccupied. Moriarty v. Home Ins. Co., 549.

POOR, CARE OF, IN STEVENS AND GRANT COUNTIES. See STAT-UTES, CONSTRUCTION OF, 325.

POSSESSION. See LANDLORD AND TENANT. 46: NOTICE, 560.

- PRACTICE. See Evidence, 59, 539; Pleading, 98; Attachment, 230; District Court, 232; Mechanics' Liens, 252, 431; Insolvency, 423; Appeal to Supreme Court, 431; Parties to Actions, 504; Jury Trial, 551.
 - If the plaintiff is given the closing address to the jury when defendant is entitled to it, a new trial will not be ordered, unless it be apparent that defendant may have been prejudiced thereby. Gran v. Spangenberg, 42.
 - A judgment appealed to the District Court on questions of law alone, can not be reversed merely because the justice having been requested to do so, has not returned all the evidence. The party's remedy in such case is, by proceeding to compel a full return. Cour v. Cowdery, 51.

Upon an appeal from a Justice's Court on questions of law alone, the District Court may, after a decision, reconsider and modify its first decision of the case. *Meister v. Russell*, 54.

On such an appeal the District Court may modify the judgment, where the erroneous part is severable from the remainder. *Id.*

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PRACTICE—Continued.

- An appeal from an order granting or refusing a new trial, suspends the entry of judgment. St. Paul & D. R. Co. v. Village of Hinckley, 102.
- If no exception be taken to the judge's charge to the jury, the defeated party can not have a new trial on the ground that the charge was erroneous to his prejudice. Bergh v. Sloan, 116.
- A defendant has not the right to prove his counterclaim on cross-examination of the plaintiff's witnesses, before plaintiff rests. Stebbins v. Hall, 169.
- The order of proofs may be regulated by the court in its discretion. Romer v. Conter, 171.
- If a jury are unable after a reasonable time to agree upon a verdict they may be discharged and the action tried anew. Rollins v. Nolling, 232.
- Variance between the pleadings and the proofs, held to have been waived. O'Connor v. Delaney, 247.
- A party, excepting to the admission of objectionable evidence, does not waive his exception by subsequently moving that the evidence be stricken out, if such motion be not granted. Gasper v. Heimbach, 414.
- If the evidence be conflicting, as to the oral contract price, the market value may be shown, to corroborate the witnesses. Saunders v. Gallagher, 422.
- An objection that the complaint does not state the particulars of a breach of the contract sued on, ought to be taken by a motion to make the complaint more definite and certain. King v. Nichols & Shepard Co, 453.
- An objection to evidence, which might be obviated by other evidence, must be specific, so that such other evidence may be supplied. *Id.*
- The forcible entry and unlawful detainer practice, does not apply to actions originally brought in the District Court. State ex rel. v. District Court, 4-3.
- To review an order, made upon a hearing of an application to appoint a receiver of the property of a debtor, under the insolvency law of 1881, a case or bill of exceptions is necessary. *Prouty* v. *Hallowell*, 488.
- When it appears that the return to this court was not in fact made by the inferior court or its proper officer, this court has no jurisdiction to review the case, and will strike the false return from its files. Paige v. Mille Lacs Lumber Co., 492.

PRESUMPTION.

Ownership of real estate, proved or admitted to have existed, is presumed to have continued, unless it is shown to have ceased. Lind v. Lind, 4%.

PRINCIPAL AND AGENT. See AGENCY.

PRINCIPAL AND SURETY. See SURETY.

PROBATE COURTS.

An administrator presented a claim against the estate and it was allowed. Eight months thereafter one of the next of kin petitioned the Probate Court to open the allowance and permit him to defend. He made practically no excuse for his laches. An order opening the matter was reversed, as an abuse of discretion. In re Kidder's Estate, 529.

PROTEST OF COMMERCIAL PAPER.

A bank receiving paper for collection, impliedly undertakes to protest, and give notice, in case of nonpayment. Mere knowledge on the part of

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PROTEST OF COMMERCIAL PAPER—Continued.

the indorser, derived from the maker, that the note was not paid at maturity, is not notice. The notice must come from a party who is entitled to look to him for payment. Jagger v. National German-American Bank, 386.

PUBLIC LANDS.

Soldier's right to entry of additional land, under U. S. Rev. Stat. § 2306, is assignable. Whitesides v. Rutan, 520.

PUBLIC POLICY. See COMMON CARRIER, 160.

PUBLICATION OF NOTICES. See NOTICE, 84.

The proof of the publication of a notice of lis pendens held sufficient in Inglee v. Welles, 197.

RAILROADS. See Personal Injuries; Common Carrier, 160, 183; Agency, 183; Injunction, 335; Indictment, 541.

Failing to maintain a gate in good repair at a farm crossing, found to be such negligence as to render the railroad company liable for stock killed on its track. Chisholm v. Northern Pacific Railroad Co., 122.

The stock escaped from an enclosure near, but not adjoining the railroad. Whether the owner was negligent in not maintaining a proper fence around this enclosure was for the jury. Id.

After the termination of the carriage of freight, and while the carrier holds it as warehouseman, he is liable to garnishment at the suit of a stranger, and is thereby excused from delivering it to the consignee until ordered by the court. Cooley v. Minnesota Transfer Ry. Co., 327.

Running a freight train at excessive speed, behind the hand car of the section men, so that one of the men was struck and injured while attempting to remove it from the track, held negligence, and the railroad liable for his injuries. Slette v. Great Northern Ry. Co., 341.

One about to cross railroad track must, if nothing prevents, look both ways to see if there is danger. If he fail to do so and is injured, he can

not recover damages. Magner v. Truesdale, 436.

A crossing over its tracks, was recognized by the railway company as a public highway, by permitting the public to cross there and by assuming to maintain the planking in proper place. A traveler was injured in attempting to cross. Held, it was immaterial that the road had not been legally laid out or established. Lillstrom v. Northern Pacific R. Co., 464.

REAL ESTATE. See SURFACE WATER, 259.

RECEIPT. See EVIDENCE, 42.

RECE VER.

- A re-eivership, in a suit to foreclose a mortgage on property of a corporation, will not prevent another receivership in a suit under 1878 G. S. ch. 76, § 9. brought to sequestrate all its property for the benefit of all its creditors. St. Louis Car Co. v. Stillwater Street Railway Co., 129.
- To review an order made upon a hearing of an application to appoint a receiver of the property of a debtor, under the insolvency law of 1881, a case or bill of exceptions is necessary. *Prouty* v. *Hallowell*, 488.
- RECORD OF DEED. See ACKNOWLEDGMENT, 560.

REDEMPTION FROM SALE.

A subsequent lien holder cannot be deprived of his right to collect his debt by redemption, to the extent of the value of the property over the amount paid to redeem, by the interposition of the liens of fraudulent and simulated securities. Parker v. St. Martin, 1.

In a case where a lien creditor redeems from the prior lien holder and redemptioner, and the property is ample security for all the liens, the court will not, at the instance of such subsequent lien holder, undertake to inquire into the validity of, or the amount due on, prior liens in order to enhance the value of the property in the hands of the last redemptioner. Id.

REFORMATION OF CONTRACTS.

An insolvent made a common law assignment as regulated by Laws 1876, ch. 44. He sought by action to reform the instrument so as to convert it into an assignment under Laws 1881, ch. 148, as amended; on the ground of mutual mistake. This was refused on the ground of his delay. Cottrell v. Cittzens' Savings Bank, 201.

RENT. See Landlord and Tenant, 480.

REPEAL OF STATUTE. See CERTIFICATE OF SALE, 522.

RIGHT OF ACTION. See Parties to Actions, 407, 446.

REMOVAL FROM OFFICE. See Officer, 147, 238.

REPEAL OF SPECIAL ACT. See STATUTES, CONSTRUCTION OF, 325.

RESPONSIBILITY FOR CRIME. See CRIMES, 541.

RETURN ON APPEAL. See APPEAL FROM JUSTICES' COURTS, 51.

When it appears that the return to this court was not in fact made or signed by the proper officer of the inferior court, this court has no jurisdiction to review the case, and will strike the false return from its files. Paige v. Mille Lacs Lumber Co., 492.

REVIEW. See PRACTICE, 488.

REVOCATION OF WILL. See WILLS, 17.

RIPARIAN RIGHTS. See WATERS.

ST. PAUL CITY CHARTER.

The charter imposes on the city the duty of paying for property taken for widening streets. Hence it is valid. State ex rel. v. Otis, 318.

SALE ON EXECUTION. See CERTIFICATE OF SALE, 522.

SALES. See BAILMENT, 27; FRAUDS, STATUTE OF, 110, 546.

A contract to sell and deliver sound rye at a railway station, is not performed unless the rye is sound when so delivered. Drews v. Ann River Logging Co., 199.

One defrauded on a sale is not barred of redress, because he was lacking in ordinary business prudence in executing the contract of purchase.

Alfred Shrimpton & Sons v. Philbrick, 366.

A written contract for the sale of logs "boomed and delivered to tug" means enclosed in a boom so that a tug could tow them away. Gasper v. Heimbach, 414.

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SATISFACTION. See Payment, 88; Discharge of Mortgage, 23.

SCALING LOGS.

Plaintiff agreed to cut, haul and pile saw logs so they could be scaled on the bank. He so piled them that a part could not be scaled, and hence were estimated. Defendants accepted and sawed up the logs. Held, that by so doing they waived the agreement as to the manner of piling. Douglas v. Leighton, 176.

SEAL.

Imports a consideration. Erickson v. Brandt. 10.

SERVICE OF NOTICES, PLEADINGS, ETC.

Service upon an attorney at his office, he being absent, cannot be made by leaving the paper in a conspicuous place in the office, if he has a clerk therein or other person in charge thereof. Mies v. Thompson, 273.

A person fourteen years old is prima facie "a person of suitable age and discretion," with whom to leave a summons or notice for the person residing there and temporarily absent. Temple v. Norris, 286.

SERVICE OF PROCESS. See SUMMONS, SERVICE OF, 84, 315.

Service by publication on "parties unknown" good, although the named party was dead. Ingles v. Welles, 197.

SET-OFF.

A corporation owed defendants a certain amount payable on demand in sash and doors to be manufactured by it. Defendants were owing it on account. The corporation being insolvent made an assignment; held, the demands should be set off. Laybourn v. Seymour, 105.

By the assignment, the corporation disabled itself to deliver the sash and doors, and the right to money in their stead at once accrued, and this was a subject of set-off under the statute. Id.

By reason of the insolvency, it was a proper subject of set-off in equity, independent of the statute. Id.

The demands of stockholders individually can not be interposed as equitable set-offs to a demand against the corporation, although the plaintiff is insolvent. Gallagher v. Germania Brewing Co., 214.

SHERIFF.

Money paid to a sheriff to redeem land from a foreclosure sale under a power in a mortgage, is received by him by virtue of his office. The attorney employed to foreclose, has not from that fact authority to demand and receive from the sheriff the money so paid. In re Grundysen, 346.

SOLDIERS.

Their right to enter additional lands under U. S. Rev. Stat. § 2306, is assignable. Whitesides v. Rutan, 520.

SPECIAL INJURIES. See NUISANCE, 492.

STATUTES, CONSTRUCTION OF. See Constitutional Law, 279.

By a special act, the town system for caring for the poor, was established in Stevens and Grant counties. A general law subsequently enacted, established the county system, where not otherwise provided by law. Still later, the special act was repealed. Held, that the county system was thereafter in force in those counties. Pushor v. Village of Morris. 325.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATION OF ACTIONS. See Limitation of Ac-TIONS.

STAY OF PROCEEDINGS. See APPEAL TO SUPREME COURT, 102.

STOCKS AND STOCKHOLDERS.

The demands of stockholders individually cannot be interposed as equitable set-off to a demand against the corporation, even though the plaintiff be insolvent. Gallagher v. Germania Brewing Co., 214.

If the charter or by-laws of a corporation fix the time and place at which regular meetings shall be held, this is itself sufficient notice to stockholders, and no further notice is necessary. Morrill v. Little Falls Mfy. Co., 371.

Those stockholders who attend, whether one or more, constitute a quorum,

and may do the business properly before them. Id.

Where stock is transferable only on the books of the corporation, the person in whose name the stock stands on its books, is alone entitled to vote it. The books are conclusive upon the question. Id.

In insolvency proceedings, under Laws 1881, ch. 148, upon an assignment by a corporation, the court may make and direct calls upon the unpaid subscriptions to stock. In re Minnehaha Driving Park Ass'n, 423.

Such call does not determine the liability of the stockholder, but makes due and payable whatever he may justly owe for his stock. Id.

STREETS.

When a road has been continuously used, kept in repair and worked for six years it is by statute a public highway. This result is not affected by the fact that proceedings previously commenced to lay it out as a highway, are still pending. Elfelt v. Stillmater Street Railway Co., 68.

A street railway imposes no additional servitude upon a street. Id.

An assessment for widening a street in St. Paul is invalid, if in advance of any hearing of the parties assessed, the district benefited is fixed and defined. State ex rel. v. Otis, 318.

The exclusive occupancy for fifteen years by a railroad for station-yard purposes, of land previously dedicated but not used for a street, held. not adverse to the public, so as to confer title by adverse possession. St. Paul & D. R. Co. v. Village of Hinckley, 398.

STREET RAILWAYS.

- If a street ra'lway company without any direction from the municipal council, lays its track in accordance with a grade established for a paving of the street contemplated, but not yet done, and so laying the track, renders the street until paved, unsafe, it is an act of negligence on the part of the company. McKillop v. Duluth Street Railway Co.,
- A teamster was injured while crossing the track of an electric street railway. Charge of negligence and counter charge of contributory negligence discussed, upon the facts in that case. Watson v. Minneapolis Street Railway Co., 551.
- At a street crossing, as high a degree of care is required of those in charge of an electric street-car, as of those driving other vehicles. Id.
- A street railway car has no priority of way at a street crossing, with respect to other vehicles. Id.

STREET RAILWAYS-Continued.

Upon much travelled streets in a city, it is negligence to run an electric car over a crossing at a high rate of speed, or without having the car under control, or without the proper means to stop it, or without a conductor or other person on the lookout. Id.

SUBROGATION.

Upon the facts stated in the case it is held that a mortgagee was not entitled to be subrogated to the rights of the holders of mechanics' liens against the mortgaged premises, which he paid with the proceeds of the mortgage. Wentworth v. Tubbs, 388.

SUMMONS, SERVICE OF.

It is not necessary in service by publication, that the publications should be made at regular intervals of seven days. Raunn v. Leach, 84.

Service by publication on "parties unknown" is good although the named party was dead. *Inglee* v. Welles, 197.

Service upon an absent defendant may be made by leaving a copy at the house of his abode with a girl fourteen years old then resident therein. She was at years of legal discretion. *Temple* v. *Norris*, 286.

The attorney for the plaintiff failed to sign his name at the end of the copy summons served. But his name was written on its back, and was signed to the copy complaint served with the summons. Held, a mere irregularity and the judgment, entered on default, valid. Lee v. Clark, 315.

SUNDAY.

When not excluded in computing time, although it is the last day. Northwestern Guaranty Loan Co. v. Channell, 269.

SUPERSEDEAS. See APPEAL TO SUPREME COURT, 102.

SURETY.

Sureties for a contractor, held released by alterations in the building contract. Erickson v. Brandt, 10.

SURFACE WATERS.

The owner may collect surface water upon his land and shed it upon land where it would not otherwise go. He may pass it to such other land in a stream, instead of in a diffused manner. Brown v. Winona & S. W. Ry. Co., 259.

TAXES AND ASSESSMENTS. See Assessors, 62.

The taxation of real estate to a particular person, is not notice of that person's rights, as against one buying from the owner of the record title in the county registry of deeds. *Roussain* v. *Norton*, 560.

TAX TITLES.

The holder of a tax title declared invalid by a judgment of court, has at once a claim to be repaid his money and interest under 1878 G. S. ch. 11, § 97, as amended by Laws 1881, ch. 10; and the statute of limitation of actions begins to run against such claim, from the day of the entry of such judgment. *Easton* v. *Sorenson*, 309.

TENANTS.

Where one of two joint tenants paid the rent and taxes, he was entitled to contribution from his cotenant. Van Brunt v. Gordon, 227.

TENDER.

A tender to either one of two joint mortgagees is operative as to the interests of both. Flanigan v. Seelye, 23.

TIME.

In computing time, the statutory rule to exclude the last day if it fall on Sunday, does not apply where the last day is expressed by its date. Northwestern Guaranty Loan Co. v. Channell, 269.

TRIAL. See JURY TRIAL; PRACTICE, 42; VENUE, 521.

One accused of a misdemeanor may waive trial by jury. State v. Woodling, 142; State v. Bannock, 419.

If the right be once waived, it can not be recalled. State v. Bannock, 419. A jury may be discharged, if within a reasonable time they are unable to

agree upon a verdict. Rollins v. Nolting, 232.

The waiver of a jury, applies only to the issues then formed. If new and different issues are subsequently made, the prior waiver does not apply. McGeagh v. Nordberg, 235.

Variance between the pleadings and the proof, held to have been waived

at the trial. O'Connor v. Delaney, 247.

Where the court on the challenge of the State, improperly rejects a juror, it will not prejudice the defendant if he be tried by an impartial jury. State v. Kluseman, 541.

A jury will be presumed impartial, if nothing to the contrary appear. Id.

TRUSTS.

Upon a conveyance of land to one person, where the consideration is paid by another, no trust arises in favor of any one not a creditor, unless the deed was made to the grantee named, without the consent of the person paying the consideration. Petzold v. Petzold, 39.

An express trust in favor of the grantor cannot be engrafted on a conveyance absolute in terms, either by parol or under the doctrine of part

performance. Pillsbury-Washburn F. M. Co. v. Kistler, 123.

ULTRA VIRES. See MUNICIPAL CORPORATIONS, 525, 528.

UNKNOWN PARTIES. See Parties to Actions, 197.

UNLAWFUL DETAINER. See LANDLORD AND TENANT, 96, 456.

USES AND TRUSTS. See TRUSTS.

USURY.

A borrower who has voluntarily repaid a part of a usurious loan, or who has paid interest not exceeding ten per cent. a year, can not recover such payment. Anderson v. Scandia Bank. 191.

The indorsee, before maturity, of a usurious note is not chargeable with notice of the usury, from her relationship to and intimacy in the family

of the usurer. Rugland v. Tollefsen, 267.

Where property is sold on a usurious mortgage, one who purchases at the foreclosure sale and pays his money without any notice of the usurious character of the mortgage, is protected as a bona fide purchaser. Holmes v. State Bank of Duluth, 350.

He who without notice of the usury, buys the certificate of sale, is also

protected. Id.

Where one buys an accommodation note of the payee, not knowing it is accommodation paper, but supposing it to be a valid subsisting security, the transaction is not usurious. Id.

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VALUE.

On the question of market value of land, the opinion of a geological expert that there is valuable stone beneath the surface, is not admissible. Roussain v. Norton, 560.

VENDOR AND VENDEE.

Vendor need not convey until the vendee performs the contract of purchase on his part. If he was to make repairs on the vendor's house in payment for the lots purchased, he must pay and satisfy the liens he causes upon the house, before he can obtain a conveyance of the lots. Erickson v. Brandt, 10.

If the vendor is unable and fails to convey the land, the vendee may recover all payments, made as principal or interest or taxes, with interest on each payment from the time it was made, and also the enhanced value given the property by his improvements, made in good faith. Lancoure v. Dupre, 301.

In such case the vendee may set off the rental value of the premises, estimated without the improvements made by the vendee. Id.

A contract "to at once proceed to procure, and use all reasonable efforts to procure" a release of an adverse interest in the land sold, is not an absolute undertaking to procure it. Orme v. Mackubin, 412.

A partnership may be formed by parol, to buy, improve, rent and sell real estate. Fountain v. Menard, 443.

VENUE.

Judgment reversed for refusal to change the place of trial for convenience of witnesses. Olivier v. Cunningham, 521.

VERDICT.

Sustained by the evidence. Mullin v. Northern Mill Co., 29; Meyer v. Berlandi, 59; Bergh v. Sloan, 116; Chisholm v. Northern Pacific R. Co., 122; Drews v. Ann River Logging Co., 199; Culver v. Scott & Holston Lumber Co., 360; Alfred Shrimpton & Sons v. Philbrick, 366; Saunders v. Gallagher, 422; King v. Nichols & Shepard Co., 458; Lillstrom v. Northern Pacific R. Co., 464; Watson v. Minneapolis Street Railway Co., 551.

Not sustained. Ulsen v. Swensen, 516.

Verdict for \$4,100 for a broken leg. held excessive and new trial granted, unless plaintiff consent to take \$2,100. Slette v. Great Northern Ry. Co., 341.

VOID TAX TITLES. See TAX TITLES, 309.

WAREHOUSEMAN.

A warehouseman may lawfully contract that no claim for loss or damage shall be valid, unless made in writing, within thirty days after the same shall have occurred. Such a contract is reasonable and valid. Armstrong v. Chicago, M. & St. P. Ry. Co., 183.

A war-houseman is liable to garnishment in respect to property in store. Cooley v. Minnesota Transfer Ry. Co., 327.

His lien for storage is superior to the claim of a pledgee of the property, who procured it to be stored. *Id*.

WATERS.

The owner may collect surface water on his own land and shed it upon land where it would not otherwise go. He may pass it to such other land in a stream, instead of in a diffused manner. Brown v. Winona & S. W. Ry. Co., 259.

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WILLS.

Where an attempted revocation of a will, is thwarted by the fraudulent act of a beneficiary, and the testator subsequently learns the facts and acquiesces in the preservation of the will, such will is unrevoked. His heirs cannot, after his death, maintain an action for the fraud. Graham v. Burch, 17.

WITNESS. See VALUE, 560.

- A witness may use a memorandum to refresh his memory, although it was not made by himself, if after inspecting it he can testify to the facts from his own recollection. Culver v. Scott & Holston Lumber Co.,
- Proof cannot be made of the business habits of a witness to corroborate his evidence. Jagger v. National German-American Bank, 386.
- When the evidence is conflicting as to the price orally agreed upon, the market value may be shown in corroboration of a witness. Saunders v. Gallagher, 422.
- One who has witnessed a person's acts, appearance and speech may express an opinion in evidence whether he was intoxicated or not. McKillop v. Duluth Street Railway Co., 532.
- It is so in respect to joy, grief, hope, despondency, friendliness, hostility, fright, jest, manner, sickness and sanity. Id.
- A witness cannot be cross-examined as to the contents of a written instrument, present but not in evidence. O'Riley v. Clampet, 539.
- One who has been a conductor of an electric street car for two months, is competent to give an opinion, within what distance such a car, going at a specified speed, can be stopped. Watson v. Minneapolis Street Railway Co., 551.

WRITING. See EVIDENCE. 42.

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